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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

JONNET DEVELOPMENT CORPORATION,
Petitioner,
v.
RICHARD S. CALIGUIRI, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in an antitrust action, the court of appeals denied petitioner's right to a jury trial by affirming the decision of the district court to try in a non-jury proceeding legal issues and issues common to both legal and equitable claims and defenses presented.

2. Whether the decision of the court of appeals in denying petitioner's right to a jury trial of legal issues and issues common to both legal and equitable claims and defenses departed so substantially from the rulings of other circuits that direction from this court is essential to assure uniform interpretation and administration of the Seventh Amendment.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Jonnet Development Corporation petitions for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Third Circuit entered February 16, 1382.[1]

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[1] Respondent Caliguiri is the Mayor of Pittsburgh, Pennsylvania. The other respondents are the members of the Mayor's Development Council—David Matter, Paul Brophy, George Carlton, Ed DeLuca, Louis Gaetano, Steve George, Ted Hardy, Ben Hayllal, Robert Lurcott, Hiram Milton, John Robin; the City of Pittsburgh; the Urban Redevelopment Authority of Pittsburgh; Consolidated Rail Corporation; Edward G. Jordan (Chairman of the Board of Conrail); and competing developers of certain hotel and business properties in downtown Pittsburgh—Grant-Liberty Development Group, a/k/a Hilton International, Vista International, the Buncher

OPINIONS BELOW

The district court's findings of fact and conclusions of law and the order of the court of appeals, are reprinted in the Appendix, pp. 1a-20a, 21a-22a. Neither the district court nor the court of appeals issued opinions in the instant case.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1982. App. p. 22a. A timely petition for rehearing was denied on March 15, 1982. App. p. 23a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The following Federal Rules of Civil Procedure provide:

1.) Rule 38(a):

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Company, Jack G. Buncher, Mondev-Buncher Station Association, and Mondev International of Montreal.

Pursuant to Supreme Court Rule 28.1, Petitioner advises the Court that it is a wholly-owned subsidiary of Jonnel Enterprises, Inc., and an affiliate of American Sports, Inc., both closely held Pennsylvania corporations.

2.) Rule 42:

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

3.) Rule 65(a):

(a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing with Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

STATEMENT OF THE CASE

A. Nature Of The Case

This is an action for treble damages under the Sherman and Clayton Antitrust Acts. Petitioner is a real estate developer and operator located in Monroeville, Pennsylvania. Petitioner and respondent Conrail signed a contract for the sale of Pennsylvania Station ("Penn Station") in the City of Pittsburgh. Whether this contract was subject to approval by the board of directors of Conrail and whether it was altered prior to this lawsuit are key factual issues in this case which petitioner contends should be determined by a jury.

Petitioner intended to develop the property as a hotel complex. Petitioner alleged that thereafter respondent city officials intervened and conspired with Conrail to block consumation of the sale and insure award of the contract to a combination of competing developers. The latter pledged to construct an office building which would not compete with a hotel planned by the city in the downtown Pittsburgh redevelopment area.

B. The Pleadings

On March 18, 1981, petitioner filed a complaint in the United States District Court for the Western District of Pennsylvania against the City of Pittsburgh, the Mayor of Pittsburgh, the members of the Mayor's Development Council, the Urban Redevelopment Authority of Pittsburgh (URA), the Consolidated Rail Corporation (Conrail), the former Chairman of the Board of Conrail, and certain competing developers of hotel and business properties in Pittsburgh. The complaint alleged violations of sections of the Sherman and Clayton Acts, 15 U.S.C. §§ 1, 2, 4, 15, 22 and 26.[2] The claim centered on the anti-competitive acts of Conrail and others in refus-

[2] Jurisdiction of the district court was invoked under 28 U.S.C. § 1337.

ing to complete the sale, or preventing the sale of Penn Station to petitioner.

The complaint alleged that petitioner, in response to a public solicitation of bids for the Penn Station property, submitted the highest bid for the property and that it then executed an Agreement of Sale with agents of Conrail.[6] Subsequent to the execution of the Agreement of Sale and upon discovering that petitioner intended to develop the property into a hotel facility, a representative of the Mayor and the City of Pittsburgh, contacted Conrail and ultimately caused Conrail to refuse to approve the Agreement of Sale or to transfer Penn Station to petitioner. Conrail instead sold the station to the URA, a party that had not participated in the bidding process, for purposes of resale to competing office building developers.

Petitioner alleged that many of the respondents had vested interests in a proposed hotel complex in the Convention Center facility in downtown Pittsburgh and acted in concert to prevent the sale of Penn Station to petitioner, thereby restricting the availability of hotel rooms in Pittsburgh in restraint of trade in interstate commerce and in violation of the Sherman and Clayton Acts. Petitioner also alleged that respondents monopolized and attempted to monopolize interstate trade and commerce in the availability of hotel accommodations.

Petitioner sought treble damages pursuant to 5 U.S.C. § 15 and requested equitable relief in the form of an order voiding the agreement of sale between Conrail and

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[6] The complaint alleged that "the terms of [the Agreement of Sale] are disputed [in a case pending before] the Court of Common Pleas of Allegheny County, Pennsylvania . . ."

Pursuant to the agreement, Conrail delivered the keys of the premises to petitioner and permitted petitioner to enter Penn Station to perform work necessary to prepare the station for renovation and prevent deterioration of the structure. Petitioner alleged it performed such work at substantial expense.

the URA and enjoining the sale transaction. Petitioner also moved for a preliminary injunction to enjoin Conrail from transferring title of Penn Station to the URA.

Although the existence of a final and binding agreement of sale was not essential to petitioner's antitrust claim, the pleadings reflect sharp disagreement as to the final form of the alleged agreement reached by the parties. Respondents Conrail and Edward G. Jordan filed an answer to the complaint in which they asserted as a defense that petitioner's claims were "based on a forged document constituting a fraud upon the court." The basis of the claims of fraud and forgery was that the contract had been altered. Conrail and Jordan also counterclaimed alleging that petitioner's filing of the complaint, knowing that it was based on a forged document, constituted malicious abuse of process. Respondents requested compensatory and punitive damages (but not equitable relief) in their counterclaim.

C. The Order For A Non-Jury Determination Of Issues

On May 11, 1981, certain respondents filed a motion pursuant to Fed. R. Civ. P. 65(a)(2) to advance and to consolidate trial on the merits with a hearing on the motion for preliminary injunction, on the grounds, *inter alia*, that "all of the evidence to be offered at such hearing is relevant to the trial on the merits" and that "consolidation is necessary to avoid repetition of evidence at the trial." In its answer to respondents' motion, petitioner tendered a limited and conditional consent to the consolidation in which it expressly reserved the right to a jury trial on the antitrust issues. This reservation was made by a clear and express proviso—

> that a new hearing date be set which would provide enough time to accomplish all depositions as aforementioned, together with the transcription of the same, together with time to inspect relevant docu-

ments and prepare for such a preliminary injunction hearing; it being understood that the purpose of the hearing will only be to determine the appropriateness of injunction as a remedy, with Plaintiff reserving the right to proceed to jury trial on the ultimate issue of antitrust law violations and damages.

After a status conference on May 22, 1981, the district court ordered consolidation of the hearing on all preliminary and permanent equitable relief as requested by respondents and also established a discovery schedule. When it later became evident that the parties could not complete discovery, the court modified the nature of the hearing, four days before the scheduled trial, and ordered that it would conduct on June 8, 1981, a non-jury hearing solely on the issue of the alleged fraud of petitioner.

D. Petitioner's Assertion Of Its Right To A Jury Trial

Petitioner demanded a jury trial in its complaint pursuant to Rule 38 of the Federal Rules of Civil Procedure. As indicated above, the demand was restated by the petitioner in its answer to respondents' motion for consolidation. Prior to commencement of the June 8 hearing, petitioner moved orally and in writing to impanel a jury for the determination of the issues to be addressed in the hearing on the ground that the hearing would encompass issues of fact common to both the equitable and legal claims and defenses presented and that this Court's decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), required that a jury be impanelled to determine the common issues.

The district court denied petitioner's request to impanel a jury. In so ruling, the court based its decision on its belief that determination of the issue concerning whether and by whom the Agreement of Sale was altered would "not be dispositive . . . . of [petitioner's] claim for money damages." The Court went on to state:

> Moreover, the affirmative defense raised by Conrail in your claim for money damages will also be addressed by a jury, and that right is guaranteed your client under the constitution.
>
> We are here today only to address the question as it applies to equitable consideration, whether or not due to unclean hands on behalf of your client, due to alleged fraud, the equitable relief in the nature of a preliminary and permanent injunction should be denied.

Accordingly, the court denied petitioner's motion to impanel a jury as well as its motions to certify the issue under 28 U.S.C. § 1292(b) as a controlling question of law, or, in the alternative, to stay the proceedings for two days in order that counsel have the opportunity to proceed with the matter before the United States Court of Appeals for the Third Circuit.[4]

Petitioner thereupon, in an attempt to preserve its jury trial right, moved to withdraw, with prejudice, all of its equitable claims for relief. Respondents would consent to such withdrawal only if petitioner also agreed to withdraw its claims for relief asserted in certain suits instituted in state court, a condition petitioner would not accept. Petitioner reiterated to the court its purpose in withdrawing all equitable claims for relief:

> [M]y client continues to maintain that it has a right to jury trial on all of the issues which the defendant wants to present today, and to the extent that there is no claim for equitable relief, then a jury trial must attach.

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[4] On the following day, petitioner, in a further attempt to preserve its right to a jury determination, filed a petition for a writ of mandamus with the United States Court of Appeals for the Third Circuit (C.A. No. 81-1943) seeking an order to compel the district court to impanel a jury. This writ was denied on grounds not specified by the court.

The court, however, once again denied petitioner's request stating "you have no right to a jury trial on the issues before me."

After an offer of proof by respondents, the hearing proceeded over the course of four days.[5] At the conclusion of the hearing, the court made, *inter alia*, the following findings:

1. That Petitioner submitted a conditional bid in the sum of $2.5 million for the property;
2. That neither Conrail's senior management nor its board of directors approved petitioner's offer to purchase Penn Station;
3. That Conrail was never "legally" bound to convey to petitioner title to the Penn Station property;
4. That petitioner had no "legal right" to receive title to the property; and
5. That the Agreement of Sale was "a fraud" and that the "fraud was intentionally perpetrated by plaintiff and its president, Elmer Jonnet, who signed all documents including [the Agreement]."

Accordingly, the court entered judgment denying equitable relief as sought by petitioner in its complaint and its motion for a preliminary injunction.

E. Proceedings Before The Court Of Appeals

A timely appeal was filed with the United States Court of Appeals for the Third Circuit (C.A. No. 81-2182). Petitioner asserted therein that it was denied its right to

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[5] Petitioner's counsel chose to stand on its claim to a right to jury trial and elected not to present testimony on the facts by its president (its representative in contract negotiations with Conrail), nor did it present expert testimony regarding the authenticity of the contract. Consequently, the findings of fact made by the trial court were made without full presentation of the evidence by Petitioner.

a jury trial on issues common to the legal and equitable claims of its antitrust suit and respondents' claim of malicious abuse of process. On February 16, 1982, the Third Circuit affirmed the judgment of the district court without opinion. A timely petition for rehearing was denied on March 15, 1982.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS EMASCULATES THE JURY TRIAL PROVISION OF THE SEVENTH AMENDMENT.

A. Decisions Of This Court Mandate That When Issues Of Fact Are Common To Both Legal And Equitable Claims, A Jury Determination Of The Legal Issues Must Precede A Non-Jury Determination Of The Equitable Issues In Order To Preserve The Constitutional Right To Trial By Jury.

The Seventh Amendment to the Constitution guarantees the right to a trial by jury in suits at common law. So firm a place in our history and jurisprudence does the maintenance of the jury as a fact finding body occupy, that "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). Moreover, Rule 38(a) of the Federal Rules of Civil Procedure reaffirms, in specific terms, the importance of this constitutional principle:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution shall be preserved to the parties inviolate.

In a long line of cases beginning with *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), and continuing with *Dairy Queen, Inc. v. Wood*, 362 U.S. 469 (1962), and *Ross v. Bernhard*, 396 U.S. 531 (1970), this Court has established that where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by try-

ing the legal issues as "incidental" (*Ross v. Bernhard, supra*, at 538; *Dairy Queen, Inc. v. Wood, supra*, at 473), to the equitable issues or by a court trial of a common issue existing between the claims. Thus, where there are factual issues common to both the legal and equitable claims, "the legal claims involved in the action must be determined *prior* to any final court determination of [the] equitable claims." *Dairy Queen, Inc. v. Wood, supra*, at 479 (emphasis supplied). This principle was not followed by the district court in the instant case, which instead chose to try, without a jury, issues common to the legal and equitable claims.

The underlying concern in these cases is the *res judicata* or collateral estoppel effect of a prior determination of facts involved in an equitable claim upon issues common to the legal claim. *Heyman v. Kline*, 456 F.2d 123 (2d Cir.), *cert. denied*, 409 U.S. 847 (1972). Indeed, this effect is already present in the instant case as evidenced by respondents' assertion in a motion for summary judgment in a related state court suit that petitioner is estopped from litigating the issue of whether a binding agreement of sale existed between it and Conrail and whether petitioner had committed fraud.[6]

In *Beacon Theatres, Inc. v. Westover, supra*, this Court dealt with a factual situation similar to the instant case. In that action, Fox West Coast Theatres, Inc. ("Fox") brought an action for injunctive and declaratory relief against Beacon Theatres, Inc. ("Beacon"). Fox alleged that Beacon had threatened to file antitrust actions against it, causing "duress and coercion," and thus depriving Fox of a valuable property right. 359 U.S. at 502. Fox prayed for a declaratory

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[6] *See Clausell, et al. v. Urban Redevelopment Authority of Pittsburgh*, Court of Common Pleas of Allegheny County, Pennsylvania, Nos. GD81-12256, 18390 and 18391 and Nos. GD80-27588 and 27590. This motion is reproduced in the Supplemental Appendix filed with the court of appeals.

judgment finding its actions lawful and not in violation of antitrust laws and further requested a temporary injunction preventing Beacon from instituting antitrust actions against it. 359 U.S. at 502.

Beacon answered with a denial and a counterclaim alleging that Fox had violated antitrust laws. Beacon requested treble damages and made a timely motion for a jury trial on all issues. 359 U.S. at 503. The trial court granted Fox's motion to strike Beacon's demand for a jury trial and ordered that the issues presented in Fox's complaint be tried to the court without a jury in advance of and separately from Beacon's counterclaim and cross-claim for damages under the antitrust laws.

Beacon sought a writ of mandamus from the Ninth Circuit which was denied. On review by certiorari, this Court reversed the decision of the court of appeals. It found that certain issues in the equitable claim were common to issues in the legal antitrust claim. Accordingly, by trying the equitable claims first, the district court might have limited Beacon's ability to try fully to a jury "every issue" bearing upon its treble damage suit. 359 U.S. at 504. This Court found that the district court should have tried the legal claim first, before a jury, prior to consideration of Fox's equitable claim for relief. In failing to do so, the district court compelled Beacon "to split up his antitrust case, trying part to a judge and part to a jury." 359 U.S. at 508 (footnote omitted).

The Court in *Beacon* concluded its opinion by stressing the high threshhold to be overcome before a jury trial of legal issues may be lost through prior determination of equitable claims, 359 U.S. at 510-11 (citation omitted):

> [T]he trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trial by the court, that dis-

> cretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial. As this Court said in *Scott* v. *Neely*, 140 U.S. 106, 109, 110: "In the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency." This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.

In this case, the district court had ample opportunity to preserve petitioner's constitutional rights and also dispose of the equitable issues raised. The district court could have granted petitioner's motion to withdraw all equitable claims for relief; or tried the legal claims first and deferred consideration of the equitable claims; or impanelled a jury to decide the question of fraud; or determined the issue of entitlement to a preliminary injunction on grounds not dispositive of ultimate issues of fact relating to the legal claims. The court took none of these steps to protect petitioner's rights, electing instead to try dispositive issues without a jury.

In *Ross v. Bernhard*, *supra*, and in *Dairy Queen v. Wood*, *supra*, this Court reaffirmed that where there are common factual issues in legal and equitable claims made in an action brought in federal court, the legal claims involved in the action must be determined *prior* to any final determination of the equitable claims. Quoting with approval the Fifth Circuit decision in *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486, 491 (5th Cir. 1961), this Court stated that "as long as any legal cause is involved, the jury rights it creates control." *Dairy Queen, Inc. v. Wood*, 369 U.S. at 473 n.8. Thus, the right to a jury trial in federal court is not lost as to

legal issues merely because those issues may be "incidental" to equitable issues. *Id.* Clearly in this case the issues in question were either legal in nature or common to the legal claims asserted.

Throughout this line of cases runs the basic principle of our Constitution and the common law, which this Court stated in *Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1935) (citation omitted):

> The right of trial by jury is of ancient origin, characterized by Blackstone as the "glory of the English law" and "the most transcendent privilege which any subject can enjoy" (Bk. 3, p. 379); and, as Justice Story said (2 Story on the Constitution, § 1779), ". . . the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms". . . Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury should be scrutinized with the utmost care.

The curtailment of petitioner's jury trial right by the district court and the court of appeals is directly contrary to the decisions of this Court. The deprivation here of petitioner's constitutional right is more obvious, since the trial court had a clear opportunity to dispose of the equitable issues without infringing upon the jury trial right.

B. There Was No Waiver Of The Right To A Jury Trial

In the court below, the respondents contended that the petitioner had waived its right to a jury trial because petitioner's counsel gave his consent to the respondents' motion to consolidate trial on the merits with a hearing on the motion for preliminary injunction, despite the fact that that consent was specifically conditioned on the preservation of the right to a jury trial. The district court did not base its decision on consent.

Moreover, Rule 39(a) of the Federal Rules of Civil Procedure provides that once a timely demand for jury trial is made, it may only be withdrawn when the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury.

Neither the petitioner nor its counsel executed a written or an oral stipulation to withdraw its demand for a jury trial. As shown above (pp. 6-7), the agreement to consolidate the trial on the merits with the hearing on the motion for preliminary injunction was expressly subject to the condition—

> that the purpose of the hearing will only be to determine the appropriateness of injunction as a remedy, with plaintiff reserving the right to proceed to jury trial on the ultimate issue of antitrust law violations and damages.

(C.A.App. at 56.)[7]

This is an express reservation of the right to jury trial, and cannot be construed as a waiver of that right either by its own terms, or as a written or oral stipulation under Rule 39(a) of the Federal Rules of Civil Procedure. If the court below decided to the contrary (it is impossible to tell the basis of its decision, since it gave no opinion), its decision is in conflict with the decisions in *Bowles v. Bennett*, 629 F.2d 1092 (5th Cir. 1980) and *Hyman v. Kline*, 456 F.2d 123 (2d Cir.), *cert. denied*, 409 U.S. 847 (1972). In both of those cases, the courts held that an agreement to consolidate does not, in itself, constitute "waiver" of the jury trial right, or withdrawal of the jury trial demand.

This Court has held that the right to a jury trial is so fundamental that courts must indulge "every reasonable presumption against waiver." *Aetna Insurance Co.*

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[7] The term "C.A. App." refers to the Joint Appendix filed with the court of appeals in the instant case.

v. Kennedy, 301 U.S. 389, 393 (1937). In the present case, the district court in denying petitioner's motion to impanel a jury did not base its decision on a waiver theory. A review of the record leads to the conclusion that the petitioner's trial counsel scrupulously refrained from any waiver and made every effort to guard the petitioner's right to a jury trial. To say that there was a waiver here is, to say the least, disingenuous. It erects a trap where petitioner's counsel took every possible step to make it clear that his first and basic objective was to protect his client's right to jury trial.

C. The Issues Adjudicated By The Trial Court Were Legal In Nature Or Were Common To Both The Legal And Equitable Claims And Defenses Presented.

Ross v. Bernhard, *supra*, teaches that the question of whether a litigant has a right to a jury trial depends on the nature of the issues to be tried rather than the character of the overall action. The "legal" nature of an issue is determined by considering: (1) the custom with reference to such questions before the merger of law and equity; (2) the remedy sought, and (3) the practical abilities and limitations of juries. *Id.*, 396 U.S. at 538 n.10.

Petitioner's complaint in this action alleged that appellees had combined to restrain trade in interstate commerce in violation of the Sherman and Clayton Antitrust Acts. (C.A.App. 10.) Antitrust actions requesting treble damages have uniformally been considered matters at law affording either party the constitutional right to a jury determination of those issues. *Curtis v. Loether*, 415 U.S. 189, 195-196 (1974); *Ross v. Bernhard*, *supra*, at 536; *Beacon Theatres, Inc. v. Westover*, *supra*.

The answer of respondents Conrail and Jordan denied petitioner's claims and further set forth an affirmative defense and a counterclaim alleging that petitioner had

altered its copy of the Agreement of Sale, that its President, Elmer Jonnet, assisted in the fraud, and that petitioner filed the action with full knowledge that it had no tenable antitrust or other claim to damages, or to the property in question.

Further, respondents' counterclaim specifically alleged malicious prosecution and requested money damages only (C.A.App. at 38, 40):

> 11. . . . Jonnet has filed this action with full knowledge that it has no tenable antitrust or other claim to the property in question, in bad faith, with malice, and knowing that it has no factual or legal basis therefor.
>
> 12. . . . Jonnet filed this action, not with the intention of vindicating any legal rights it might have, but rather, with the intention and purpose of misusing and abusing the process of this Court.
>
> • • • •
>
> WHEREFORE, Conrail and Jordan each demand judgment against Jonnet for compensatory damages in excess of $10,000.00 each, for an award of punitive damages and for their attorneys' fees and costs.

While fraud in the abstract states neither a legal nor an equitable cause, the pre-federal rules case law manifestly establishes that appellees' counterclaim is legal in nature:

> For the purpose of determining whether an issue of fraud should be tried to the court or to the jury the relief sought by the party raising the issue becomes important. Thus where the plaintiff seeks damages for the conversion of chattels as a result of defendant's fraud the claim is legal. Similarly a claim for damages predicated upon the fraud and deceit of the defendant is essentially an old common law action of trespass on the case. (Footnotes omitted).

5 Moore's Federal Practice ¶ 38.20 (2d Ed. 1980).

At common law, the counterclaim brought by respondents would fall within the legal action known as trespass on the case, embracing suits for damages based on fraud and deceit, or malicious prosecution. 5 Moore's Federal Practice ¶ 38.11[5] (2d Ed. 1980). As a legal action, in premerger practice, such claims afforded a party a right to a jury trial:

> The Seventh Amendment to the United States Constitution preserves the right to a jury trial in all suits at common law where the value in controversy exceeds twenty dollars. Rule 38 of the Federal Rules of Civil Procedure also preserves this right. An action for malicious prosecution falls well within the recognized forms of action at common law.

Smoot v. Fox, 353 F.2d 830, 833 (6th Cir. 1965), *cert. denied*, sub nom. *League of Women Voters v. Smoot*, 384 U.S. 909 (1966).

Besides the classification of both the fraud and malicious prosecution claims as legal under premerger procedure, the record indicates that the parties considered the counterclaim as one for damages. Immediately preceding the trial on the counterclaim, appellant made a motion to withdraw all equitable claims for relief.[8] Respondent Conrail expressed a desire that, if the trial court should grant petitioner's motion, the counterclaim should survive as a legal claim (C.A.App. at 117):

> THE COURT: Now so the record is clear, the plaintiff has filed a motion to withdraw its request for equitable relief as set forth in plaintiff's prayers for relief, and Counselor Silvestri has indicated that that would include a request for preliminary and permanent injunctive relief.
>
> MR. MANION [Counsel for respondents Conrail and Jordan]: Yes, and in addition to the matters which Your Honor feels still are not resolved by that, it seems to me—and I just want to make sure

[8] Granting such a motion was an obvious method of preserving petitioner's Seventh Amendment rights while relieving respondents of the burden of litigating the equitable claims.

> this is clear—so far as the defendant Conrail and Jordan and I believe all defendants are concerned, that it [the withdrawal of plaintiff's equitable claims] doesn't affect our right to claim damages for what we consider to have been a frivolous or bad faith action, and also that it does not waive or abandon our claim that a fraud has been perpetrated on the Court even in the action for money damages.
>
> THE COURT: It couldn't.

In light of the foregoing, it must be concluded that respondents' affirmative defense and counterclaim are legal in nature. Moreover, in *Ross v. Bernhard*, *supra*, and *Dairy Queen v. Wood*, *supra*, this Court found that since the claims of the litigants were for damages, the claims were legal in nature.

The instant case presented to the trial court a situation in which common issues of fact were essential to both the legal and equitable claims and defenses asserted. Respondents' affirmative defense of fraud and legal counterclaim of malicious prosecution were based on the allegation that petitioner fraudulently altered the sales agreement through which it claimed title to Penn Station—the property at the center of the dispute. Petitioner, on the other hand, asserted that it was the officials of respondent Conrail who possessed the motivation to alter the sales agreement as part of an overall plan to prevent sale of Penn Station to petitioner. Thus, the issue of fraudulent alteration was not only relevant to a determination of whether equitable relief was appropriate, but it was essential to respondents' legal counterclaim for damages and appellant's legal claim for violation of federal antitrust laws. Furthermore, the most obvious defense to the alteration allegation was the existence and scope of an agreement and conspiracy among respondents to deny the property to petitioner,[9]

---

[9] This defense was known to the trial court. In a deposition read to the court, John Jaeger, Director of Field Services for Conrail's Real Estate Department responded under oath:

[Footnote continued on page 20]

clearly an issue within the ambit of petitioner's legal cause of action. It was in recognition of these facts that trial counsel moved the court at the outset of the hearing to impanel a jury to determine the issue of alteration of the sales contract.

Indeed, although the trial court denied petitioner's motion to impanel a jury, it recognized the all-encompassing importance of the issues being tried (C.A. App. at 88):

> THE COURT: I would point out to the plaintiffs that I expect a motion to dismiss and claim for all equitable relief at the conclusion of the testimony on the fraud, on the theory that if the documents were altered, that the evidence is clear and convincing on the point, and, as result, the court should dismiss at the very least the claim for equitable relief because of that fraud on the court, and of course that type of conduct would be relevant as to whether or not we should go further with a request for preliminary relief, *and it may be relevant on the question of monetary damages also, if fraud has been established by clear and convincing evidence.* [Emphasis added].

---

[9] [Continued]

"Q Did you or anyone there tell him [*i.e.*, Elmer Jonnet] that this decision had been made in part due to political consideration?

"A Yes.

"Q Would you describe what was said as you best remember it?

"A The thrust of the conversation was that under the circumstances Conrail really didn't have any alternative but to go along with the City in the matter. Politics was clearly involved. Conrail is an organization that was dependent upon the Federal Government for necessary funding.

"Under those circumstances with the City indicating that it wanted the property for a major redevelopment project, it was very important to it; the fact that they were offering us more money; you put all of those things together and Conrail just could not refuse to go along."

Transcript of Hearing beginning June 8, 1981 at 514.

Applying the criteria of *Ross v. Bernhard, supra*, to the instant case, it must be concluded that the petitioner's antitrust claim for treble damages and respondents' defense and counterclaim for damages were legal in nature. Without a finding of fraudulent alteration of the sales agreement, respondents' legal claim had no basis. Moreover, the determination by the trial court may collaterally estop petitioner from attempting to prove that Conrail officials altered the document as part of the overall design to prevent the sale of Penn Station to appellant.

This Court has emphasized that "[t]he federal policy favoring jury trials is of historic and continuing strength," *Simler v. Conner*, 372 U.S. 221, 222 (1963), and that any seeming curtailment of the jury trial right should be scrutinized with the "utmost care." *Dimick v. Schiedt, supra.* When viewed against this background and the teachings of *Beacon Theatres, supra*, the unavoidable conclusion is that the trial court committed an abuse of discretion, and the court of appeals erred, in denying petitioner its right to a jury trial on all issues relevant to its antitrust claim and all issues common to both legal and equitable claims.

II. THE COURT OF APPEALS SANCTIONED A DEPARTURE BY THE TRIAL COURT SO CONTRARY TO THE ACCEPTED INTERPRETATION BY OTHER CIRCUITS OF THE SEVENTH AMENDMENT AND THE FEDERAL RULES OF CIVIL PROCEDURE AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION TO ASSURE UNIFORM INTERPRETATION OF THE RIGHT TO JURY TRIAL.

The decision of the court of appeals is in conflict with decisions in other circuits holding that where both injunctive and legal remedies are requested, the trial court must not adjudicate, in an equitable proceeding, issues common to the legal claims.

In the case of *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486 (5th Cir. 1961), Chemi-

Cord filed a complaint to restrain Thermo-Stitch from interfering with its business relations and from harassing it by threats of suit. The complaint requested an injunction and a declaratory judgment. Thermo-Stitch asserted a counterclaim for damages for patent infringement, fraud and antitrust violations, and it demanded a jury trial on the issues the counterclaim raised. The trial court on the authority of Fed. R. Civ. P. 42(b) subsequently granted Chemi-Cord's motion for an immediate and separate trial on the issues of validity and infringement of the patent, and struck Thermo-Stitch's motion for a jury trial on those issues.

The Fifth Circuit initially addressed the difficulties trial courts experienced prior to this Court's decision in *Beacon Theatres*. It said, 294 F.2d at 488-89:

> The difficulty comes in deciding whether the legal or the equitable cause should be tried first—an issue of practical importance to litigants, since the determination of either cause acts as collateral estoppel on common questions of fact in the other. The broad grant of discretion under Rule 42 for a trial judge to order separate trials would seem to imply authority to decide the order of the separate trials, but courts struggled with this problem without clear guidelines.

In holding that the trial court erred in proceeding first with the equitable claim that contained issues common to Thermo-Stitch's legal counterclaim, the Fifth Circuit said, 294 F.2d at 490-91 (footnote omitted):

> Beacon Theatres holds that where the presence of legal and equitable causes in the same case requires the selection between a jury and a non-jury determination of certain common issues, the discretion of the trial court is "very narrowly limited and must, wherever possible, be exercised to preserve jury trial." 359 U.S. at 510. Analogizing a motion for a non-jury trial of common issues to a suit for an injunction, the Court held that a showing of irreparable injury and inadequate relief at law is

required: "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies. At least as much is required to justify a trial court in using its discretion under the Federal Rules to allow claims of equitable origins to be tried ahead of legal ones, since this has the same effect as an equitable injunction of the legal claims." 359 U.S. at pages 506-507. While the right to trial by jury is a constitutional one, no similar importance attaches to trial by court. Under the flexible procedures of the Federal Rules, a jury determines issues pertinent to an equitable cause without interruption or prejudice to the proceeding; the court decides whether equitable relief is called for on the basis of the jury's findings of fact. The mere presence of an equitable cause furnishes no justification for depriving a party to a legal action of his right to a jury trial. . . . As long as any legal cause is involved the jury rights it creates control.

Other circuits presented with the same issue have taken similar measures to insure that the litigant's right to a jury trial on common issues was not precluded by prior determination of equitable claims. In *Tights Inc. v. Stanley*, 441 F.2d 336 (4th Cir.), *cert. denied*, 404 U.S. 852 (1971), the Fourth Circuit faced a problem somewhat similar to that addressed by the Fifth Circuit in *Thermo-Stitch*. In a patent infringement action, the trial court struck the jury demand of Tights, Inc. on the issues of patent validity and patent infringement choosing instead to address those issues in the equitable proceeding for an injunction requested by the plaintiff against Tights, Inc. The Fourth Circuit issued a writ of mandamus in that case and ruled that the trial court erred in attempting through the equitable proceeding to address the issues common to the legal and equitable claims presented. See also *Davis v. Ampthill Rayon Workers, Inc.* 446 F.Supp. 681 (E.D. Va. 1978), *aff'd*, 594 F.2d 586 (4th Cir. 1979).

This same decision was reached by the Second Circuit in *Robine v. Ryan*, 310 F.2d 797 (2d Cir. 1962) (jury trial on legal claims must precede a trial of any equitable issues that remain) and the Tenth Circuit in *United States v. State of New Mexico*, 642 F.2d 397 (10th Cir. 1981) (trial court erred in conducting hearing on injunction—New Mexico was entitled to have jury decide "the pivotal issue of fact"). *See also Lucas v. Philco-Ford Corp.*, 380 F. Supp. 139 (E.D. Pa. 1974) (where plaintiff sought both monetary damages and injunctive relief he was entitled to a jury trial on his legal claims, including all issues common to both legal and equitable claims).

Moreover, some courts have seen fit to have the jury try both the legal and equitable claims. *See Commercial Iron & Metal Co. v. Bache Halsey Stuart, Inc.*, 581 F.2d 246 (10th Cir.), *cert. denied*, 440 U.S. 914 (1978) (claims for monetary damages and rescission of contract); *Prudential Insurance Co. v. Bonney*, 299 F. Supp. 794 (W.D. Okla. 1969) (mortgage foreclosure suit with counterclaims of slander of title).

This Court has often granted certiorari in cases where the courts of appeals have differed in their interpretation of federal statutes or rules. *See, e.g., United States v. Muniz*, 374 U.S. 150 (1963); *United States v. O'Malley*, 383 U.S. 627 (1966). The decision of the Third Circuit in the instant case constitutes so great a departure from the accepted practice followed by other circuits that the Court should exercise its authority and grant the petition for a writ of certiorari for the purpose of instructing the circuits on the interpretation of fundamental constitutional rights.

CONCLUSION

The decision of the court of appeals denying petitioner its Seventh Amendment right to a jury trial on legal issues and issues common to both the legal and equitable claims represents a departure from the decisions of this Court. It deprives petitioner of its constitutional right to a jury trial under the Seventh Amendment. In addition, the decision is contrary to the decisions of other circuits interpreting the Seventh Amendment in similar situations. This Court should grant certiorari to make it clear to the lower courts that the constitutional right to jury trial is so precious that it should not be taken away by specious claims of waiver or through legalistic grounds of collateral estoppel, based essentially on a trap, in the teeth of a reservation against such a result.

The petition for a writ of certiorari should be granted and the judgment below reversed with directions that the District Court grant a new trial to be held in compliance with the jury trial provisions of the Seventh Amendment.

Respectfully submitted,

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June, 1982.

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-421

JONNET DEVELOPMENT CORPORATION,
Plaintiff

vs.

RICHARD S. CALIGUIRI *et al.*,
Defendants

EXCERPT FROM PROCEEDINGS

Transcript of Findings of Fact and Conclusions of Law at Hearing on Motions for Preliminary and Permanent Injunctions on June 16, 1981, United States District Court, Pittsburgh, Pennsylvania, before Honorable Donald E. Ziegler, District Judge.

APPEARANCES:

On behalf of Plaintiff:

John M. Silvestri, Esquire

On behalf of Defendants Caliguiri, Matter, Brophy, DeLuca, Gaetano, Hayllar, Lurcott and City of Pittsburgh:

Dante Pellegrini, Assistant City Solicitor

On behalf of Defendants Charlton, The Buncher Company and Jack G. Buncher:

Mary Reitmeyer, Esquire

On behalf of Defendants George, Robin and Urban Redevelopment Authority of Pittsburgh:

Robert M. Brown, Esquire
Jo An Haller, Esquire

MARILYN G. BROWN
Official Reporter

On behalf of Defendant Milton:
Eugene Mikolajczyk, Esquire

On behalf of Defendants Consolidated Rail Corporation and Jordan:

Paul A. Manion, Esquire
Kevin P. Lucas, Esquire

On behalf of Defendant MONDEV International of Montreal:

Michael C. Hanzel, Esquire

• • • •

[2] (Proceedings resumed in open court at 9:05 a.m. on June 16, 1981.)

• • • •

THE COURT: All right, sir.

This is the case of Jonnet Development Corporation, Plaintiff, vs. Richard S. Caliguiri and others, Defendants, at Civil Action No. 81-421, and the following shall constitute findings of fact and conclusions of law:

1. This is a civil action for equitable relief and money damages, predicated on Section 4 of the Clayton Act, 15 USC Section 15, and Sections 1, 2, 4, 15, 22 and 26 of the Sherman Act. Jurisdiction is based on 28 USC Sections 1331 and 1337.

2. Section 1 of the Sherman Act, 15 USC Section 1, provides in relevant part, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal: . . ."

Section 4 of the Clayton Act, 15 USC Section 15, provides in pertinent part, "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to the amount in controversy, and shall recover

threefold the damages by him [3] sustained, and the cost of suit, including a reasonable attorney's fee."

3. The phrase "antitrust laws" includes the Sherman and Clayton Acts. 15 USC Section 12(a).

4. Jonnet Development Corporation instituted this civil action on March 18, 1981, against 22 defendants, alleging a conspiracy to restrain construction of a hotel by plaintiff in the Pennsylvania Railroad Station Complex in Midtown Pittsburgh.

Plaintiff also instituted a number of state court actions in the Court of Common Pleas of Allegheny County, Pennsylvania, seeking specific performance, a constructive trust, and money damages.

The federal and state court equitable claims constitute a cloud on the title and thereby are preventing various lenders from advancing funds to a second developer for renovation of the subject property. These equitable claims have also prevented Consolidated Rail Corporation from scheduling a closing date and transferring title to the Urban Redevelopment Authority of Pittsburgh.

5. This case also has broad public interest connotations. All parties admit that the building is historically significant because it is a landmark and, due to its state of disrepair, it is wasting due to weather conditions.

From a private point of view, the federal and state [4] court equitable claims of Jonnet Development Corporation have barred Conrail from scheduling a closing on the property, have prevented Conrail from conveying title to the property, have prevented Conrail from receiving $2.75 million in payment for the property, and also have interrupted startup work on the complex to prevent further destruction of the superstructure due to the weather elements.

6. In the complaint of the plaintiff, Jonnet Corporation seeks the following equitable relief at Paragraph 31:

"Voiding the Agreement of Sale between Defendant, CONRAIL, and Defendant, URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH;" and "Enjoining Defendant, CONRAIL, and Defendant, URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH, to convey the property of PENN STATION to Plaintiff."

The same requests for equitable relief are set forth in the WHEREFORE clause, namely, voiding the agreement of sale between Conrail and Urban Redevelopment Authority and enjoining the conveyance.

7. Despite the teachings of *Beacon Theatres, Inc., vs. Westover*, 359 U.S. 500 (1959), plaintiff filed a motion for a preliminary injunction on April 7, 1981, alleging that legal relief was inadequate due to the existence of irreparable harm.

Jonnet Corporation sought preliminary injunctive relief enjoining the defendants, Urban Redevelopment [5] Authority, Consolidated Rail Corporation, Buncher Company, MONDEV-Buncher Associates, and their agents, from (a) effectuating any agreements for transfer of Pennsylvania Station; (b) entering into any additional agreements for the alienation and transfer of the realty; (c) making any alterations or improvements to said property absent Court approval; and (d) preventing plaintiff or its representatives from entering the Penn Station property.

8. At plaintiff's urging, a hearing was set for the earliest possible date, namely, May 26, 1981, at 10:00 a.m.

The Court also ordered at plaintiff's request that all defendants appear at the hearing for cross examination by Jonnet's counsel, as well as Messrs. Huff, Jaeger, Williams and Schimmel, employees of Conrail, without the necessity of subpoena by plaintiff.

The affidavit of Elmer J. Jonnet, Jr., was filed with the motion for preliminary injunction, in which he at-

tested to personal knowledge of the averments of the motion, including the fact that, ". . . Plaintiff is entitled to receive title to said real estate, in that Plaintiff was the highest bidder . . ."

Finally, Jonnet requested and the Court ordered on April 7, 1981, as follows: "Plaintiff's discovery served upon Defendants ten (10) days prior to the date set for preliminary injunction hearing shall be completed and response and answers [6] thereto shall be served upon Plaintiff two (2) business days before preliminary injunction hearing."

9. Discovery had already commenced in the state court action in the case of plaintiff versis Consolidated Rail Corporation, GD No. 80-27589, and plaintiff continued its extensive efforts in this Court.

The various defendants in the instant case filed answers and motions to dismiss, which the Court denied without prejudice, pending the hearing on plaintiff's motion for preliminary injunction.

Jonnet filed motions to produce and interrogatories, to which, as ordered by the Court, the defendants were required to respond on or before May 21, 1981. The motions to produce and interrogatories of plaintiff were filed on April 7, 1981, and therefore the defendants were required to respond on or before May 21, 1981, two business days before the injunction hearing, the hearing being, of course, set for May 26, and the 25th of May was the celebration of Memorial Day.

10. On May 4, 1981, defendants, Consolidated Rail Corporation and Edward G. Jordan, filed a consolidated answer denying the averments of the complaint and, in a defense denominated as THIRTEENTH, averred as follows: "As more fully set forth in the counterclaim hereto, Jonnet's claims in this action are founded upon a forged document which [7] constitutes a fraud upon the Court."

Further, Conrail asserted in an affirmative defense that the Penn Station property had been let to bid on the following terms and conditions: "In the event either Conrail's Senior Management or Board of Directors fails to approve and authorize this transaction as aforesaid within ninety (90) days from the date of this agreement, or in the event the conveyance on the terms herein provided would be contrary to any law, regulation or order of governmental authority, then the sum paid on account will be refunded without interest to Purchaser who hereby agrees to accept same, whereupon this agreement shall be cancelled and annulled and neither party hereto shall have any claim whatever against the other by reason hereof."

Further, on page 7, the agreement provided: "Anything herein to the contrary notwithstanding, it is distinctly understood and agreed that this instrument does not constitute a binding agreement or impose any obligation on Conrail or its successors or assigns or its agents unless and until Conrail's Assistant Vice President Real Estate or his duly authorized representative, as authorized by Conrail's System Real Estate Office, gives written notification to Purchaser to the effect that this transaction has received the necessary approval and authorization of Conrail's Senior Management and/or Board of Directors and that Conrail is [8] legally bound."

Thus, Conrail concluded that the alleged agreement of sale relied on by Jonnet to receive title to the property was a fraud, since it contained knowing and intentional alterations; and, further, that Conrail retained the exclusive right to reject any bid by Jonnet or anyone else and convey the property, as it planned to do, to Urban Redevelopment Authority of Pittsburgh for $2.75 million. Jonnet had offered $2.5 million in an offer dated July 1, 1980. Hence, Conrail contended that Jonnet's reliance on a forged document was a fraud on

the Court, since Jonnet knew of the forgery and filed suit in bad faith.

11. On May 11, 1981, defendants, Jack D. Buncher and The Buncher Company, filed a motion to advance and consolidate the trial on the merits with the motion of Jonnet for a preliminary injunction.

12. On May 20, 1981, Jonnet filed a motion to continue the hearing on the preliminary injunction. In its motion, Jonnet Development Corporation stated at Paragraph 9 as follows: "With reference to BUNCHER's Motion . . ., Plaintiff will consent to the same, provided that a new hearing date be set which would provide enough time to accomplish all depositions as aforementioned, together with the transcription of the same, together with time to inspect relevant documents and prepare for such a preliminary injunction hearing; it [9] being understood that the purpose of the hearing will only be to determine the appropriateness of injunction as a remedy, with Plaintiff reserving the right to proceed to jury trial on the ultimate issue of anti-trust law violations and damages."

13. On May 22nd, 1981, the Court granted the motion of Jonnet to continue the claim for equitable relief. The Court scheduled a hearing on plaintiff's request for equitable relief for June 8, 1981, at 10:00 a.m., at plaintiff's urging.

The Court established a discovery schedule at the status conference of May 22nd, 1981, which would enable Jonnet Corporation to go forward on its claim for equitable relief on June 8, 1981, and postpone until a later date the claim of Jonnet for damages under the Sherman and Clayton Acts before a jury.

Moreover, a review of the exhaustive discovery undertaken by Jonnet Corporation prior to the hearing of June 8 indicates that plaintiff was able and willing to proceed with its equitable claim for relief at that time.

14. On June 4, 1981, the Court conducted a second status conference at the request of the parties. The Court ordered that since plaintiff was seeking equitable relief prior to consideration by a jury of plaintiff's claim for antitrust damages, the Court should hear evidence at the hearing on June 8 concerning the defense of Conrail that [10] Jonnet Corporation had knowingly filed suit or was relying upon a forged document.

At page 3 of the transcript, the Court stated: "One of the issues in this case raised by the defendants as an affirmative defense is that there has been a fraud on the court in that certain documents were altered and certain perjurious testimony has been presented. The question of whether or not there has been a fraud on the court is important as to whether equitable relief would be granted, and therefore the court will hear on Monday, June 8, through Thursday, June 11, 1981, the testimony from all parties concerning the question of whether or not any documents have been altered."

The transcript at page 7 indicates that Jonnet Corporation agreed to this procedural device to determine plaintiff's right to equitable relief.

Further, it is obvious that since plaintiff was the party urging a trial on equitable relief prior to the antitrust claim for damages, and if Conrail established fraud by Jonnet Corporation by clear and convincing evidence, the equitable claims must be denied based on the equitable doctrine of unclean hands.

Thus the use of Rule 42(b) was clearly appropriate under the circumstances, bearing in mind that Jonnet Corporation would litigate its legal issues before a jury at a later [11] date, as urged by Jonnet from the outset.

15. The foregoing facts make clear that the case of *Beacon Theatres vs. Westover*, 359 U.S. 500 (1959), is inapposite.

Plaintiff was the party that moved this Court to treat the equitable claim prior to adjudication by a jury of the legal issues for declaratory judgment and money damages. Plaintiff moved on two occasions for an advanced equitable hearing, and the Court set two dates for such a hearing, that is, May 22nd and June 8th, 1981.

The use of Rule 42(b) with respect to plaintiff's claim for equitable relief was judicious, because if Conrail established the defense of unclean hands by clear and convincing evidence, plaintiff's claim for equitable relief must be denied.

The transcript of June 8 makes clear the basis for our ruling, and Jonnet's motion for mandamus in the Court of Appeals and recusal to this Court is specious and without merit.

The Court's ruling on June 8 concerning plaintiff's demand for a jury trial is also sound, since a bench trial is the proper means for adjudicating equitable claims which are pressed by a plaintiff at its specific request prior to consideration of the legal issues.

The transcript of the proceeding on June 8 at [12] pages 2 through 8 indicates that Jonnet Corporation will be accorded a trial by jury at a later date, if it desires, on its claims for declaratory relief and money damages.

16. Turning to the question of unclean hands as a basis for denying equitable relief, the Court properly imposed the burden of proof upon Consolidated Rail Corporation. Conrail must prove this defense by clear and convincing evidence. See *Monsanto Company vs. Rohm & Haas Company*, 456 F.2d 592, 598 through 599 (Third Circuit, 1972).

17. Issues of fact in civil cases are ordinarily determined in accordance with the preponderance of the

evidence test. Some state courts have consequently held that in seeking to prove fraud, a party need only produce a preponderance of the evidence. See 37 C.J.S., Fraud, Section 114 (1943 and 1980 Supplement).

However, that standard is not in accord with federal jurisprudence, where a more exacting standard has been applied. A party asserting fraud as the basis for a claim or defense must prove that a fraud was perpetrated by clear and convincing evidence. See *Monsanto Company vs. Rohm & Haas*, 456 F.2d at 601, and footnote 14 and the dissent of Judge Kalodner.

As was stated by the Court of Appeals for the Fifth Circuit in *Kinnear-Weed Corporation vs. Humble Oil & Refining*, 441 F.2d 631 (Fifth Circuit, 1971), "In testing [13] sufficiency of proof in federal courts, federal not state standards must be applied. . . . We hold that fraud proof must be built of sterner stuff. Clear and convincing evidence was what was required."

See, also, *In re Multidistrict Litigation Involving Frost Patent*, 540 F.2d 601, 603 (Third Circuit, 1976), where the Court of Appeals for this jurisdiction held that patent fraud must be proven clearly, unequivocally and convincingly.

We note that this same exacting standard obtains under Pennsylvania law. See, namely, *Highmont Music Company vs. J. M. Hoffman Company*, 397 Pa. 345, 155 A.2d 363 (1959). In *Highmont*, the Court held that fraud must be proven by evidence that is clear, precise and indubitable.

18. As Judge Aldisert stated in *Monsanto Company vs. Rohm & Haas* at page 598, "We perceive the test to be that set forth by the Supreme Court in *Precision*: 'The facts of a given case must accordingly be measured by both public and private standards of equity':

> "The guiding doctrine in this case is the equitable maxim that 'he who comes into equity must come

with clean hands.' This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been [14] the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' . . . Thus while 'equity does not demand that its suitors shall have led blameless lives,' . . . as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. . . .

"This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is 'not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.' Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maximum by the chancellor."

19. In addition, in Volume 37 of Corpus Juris Secundum, Section 93, Equity, page 1006 (1965 and 1980 Supplement), it is stated as follows:

[15] "He who comes into equity must come with clean hands. The well-established principle expressed in this maximum is one of ancient origin and broad application. It is a cardinal maxim and the expression of the elementary and fundamental conception of equity jurisprudence. Although not the source of any distinctive doctrine, it furnishes a most important and universal

rule affecting the entire administration of equity jurisprudence as a system of remedies and remedial rights.

"This maxim expresses rather a principle of inaction than one of action, and may be invoked only to prevent affirmative equitable relief. It means that equity refuses to lend its aid in any manner to one seeking its active interposition who has been guilty of unlawful or inequitable conduct in the matter with relation to which he seeks relief. Equity denies affirmative relief for such conduct no matter how improper may have been defendant's behavior or how serious are the charges of wrongdoing laid to defendant, and even though it thereby leaves undisturbed and in ostensible full legal effect acts or proceedings which would affirmatively be set aside but for such consideration.

"The maxim is based on conscience and good faith. It is not strictly or primarily a matter of defense. It has been held by the courts that the maxim is not applied to favor a defendant, and has nothing to do with the rights or [16] liabilities of the parties, but is invoked in the interest of the public on grounds of public policy and for the protection of the integrity of the court. According to some authorities the principle of withholding relief from complainant because of unclean hands is punitive in its nature, but others hold that the maxim is not invoked for purposes of retribution or punishment.

"Whether parties are within the application of the maxim is primarily a question of fact, and the court, on any suggestion that a plaintiff has not acted in good faith concerning matters on which he bases his suit, must inquire into the facts in that respect. There must be some evidence to justify the application of the doctrine by the court, and it should not be applied unless the person against whom it is sought to be applied was apprised of the claim of unclean hands and afforded an opportunity to present such evidence as might bear on that issue."

20. The first question we must determine is whether Consolidated Rail Corporation has presented clear and convincing evidence that the agreement dated July 1, 1980, was materially altered.

Conrail presented evidence which, if believed, would meet this test.

Messrs. Williams and Hindman testified that Exhibits 5A and 5B accurately reflect the terms and conditions [17] on which Elmer Jonnet as President of Jonnet Development Corporation submitted a bid to Conrail to purchase the subject property. According to them, the inserts on lines 1, 8, 9, 10, 16, 17, 18, 19, 20, 21 and 22 were made by either or both in longhand.

Further, the agreement contains seven pages, and page 6 included this final paragraph: "Anything to the contrary notwithstanding, it is distinctly understood and agreed that this instrument does not constitute a binding agreement or impose any obligation on Conrail or its successors or assigns or its agents unless and until Conrail's Assistant Vice President Real Estate or his duly authorized representative, as authorized by Conrail's System Real Estate Office, gives written notification to Purchaser to the effect that this transaction has received the necessary approval and authorization of Conrail's Senior Management and/or Board of Directors and that Conrail is legally bound."

Thus, this evidence, if correct, would establish that Jonnet Development Corporation submitted a conditional bid in the sum of $2.5 million for the property, the conditions being (a) approval by Senior Management or the Board and (b) written notice to the Purchaser of the approval by Senior Management or the Board.

21. Messrs. Williams and Hindman appeared to this Court to be truthful and honest witnesses, and this Court finds as [18] a fact that Jonnet Development Corporation submitted a bid to Conrail on July 1, 1980, for

the Penn Station property which was subject to the approval and authorization of Conrail's Senior Management and/or Board of Directors.

Further, this Court finds as a fact that neither Senior Management nor the Board of Directors approved the offer to purchase the property by plaintiff for $2.5 million. Thus Conrail was never legally bound to convey title to the property to Jonnet Development Corporation, since its bid was never accepted, as required by the agreement.

22. Consoliated Rail Corporation has also proved much more.

Messrs. Williams and Hindman testified and we find as a fact that page 6 of the proposal submitted by Jonnet Development Corporation contained no markings or deletions on the final paragraph. Thus, not only was plaintiff's offer subject to Senior Management and/or Board approval, it was also subject to the requirement that before Conrail would be legally bound, the Assistant Vice President Real Estate or his authorized representative must give written notice to Jonnet of the required approval.

Further, we find that neither Conrail's Board nor its Senior Management ever accepted plaintiff's offer to purchase the property, and therefore plaintiff has no legal right to receive title to the property.

[19] 23. Conrail has also established that Exhibit 5C is a fraud. The evidence is clear, convincing, precise and indubitable that the exhibit contains material and intentional alterations.

First, page 6 contains a line through the final paragraph which was not part of plaintiff's offer on July 1, 1980. See Exhibits 5A and 5B for correct copies of plaintiff's offer to purchase.

Second, an extremely qualified expert has testified that pages 1 and 6 of Exhibit 5C are additions and were not part of Jonnet's offer on July [illegible] 1980. This evidence corroborates, of course, the testimony of Messrs. Williams and Hindman.

To support his conclusions, Mr. Walls provided a number of credible findings which we accept:

First, page 1 of Exhibit 5C is typed, and Exhibits 5A and B contain longhand printed inserts on lines 1, 8, 9, 10, 16, 17, 18, 19, 20, 21 and 22.

Second, Exhibit 5C contains typed inserts of the Prestige Elite Model 72 style, but Exhibits 5A and B are typed on IBM Standard.

Third, pages 1 and 6 of Exhibit 5C are thicker than pages 2, 3, 4, 5 and 7 of Exhibit 5C, as measured on a micrometer.

Fourth, pages 1 and 6 of the same exhibit, namely, [20] Exhibit 5C, were done by dry copy, but Exhibits 5A and B were done with a wet copy machine such as used by Conrail.

Fifth, pages 1 and 6 of Exhibit 5C are longer than the remaining pages.

Sixth, no visible handwriting impressions were found on pages 1 or 6 of Exhibit 5C, but such impressions appear on pages 2, 3, 4 and 5, and all six pages of Exhibits 5A and B.

Seventh, ultraviolet light testing showed Exhibits 5A and B and all pages of 5C except pages 1 and 6 to reflect the same light.

And eighth, the staples on Exhibits 5A and B contain inherent flaws, but the 5C staples were different.

Thus he opined and we find as a fact that Exhibit 5C contains material alterations designed to remove from the transaction the requirement of written notice to

Jonnet Development Corporation of Board or Management approval and further designed to create the impression that Conrail was legally bound to convey the property to Jonnet Development Corporation for $2.5 million, all of which is false.

As a result, we find that Conrail has established by clear and convincing evidence that plaintiff's proposal dated July 1, 1980, to Consolidated Rail Corporation to purchase the Penn Station property was materially altered [21] in that the correct proposal is evidenced by Exhibits 5A and B and an intentionally and materially altered version is evidenced by Exhibit 5C.

24. The next question we must address is whether Conrail has established by clear and convincing evidence that the material alterations were done intentionally by plaintiff.

It should be remembered that plaintiff was represented at all times during the offers of January 8 and July 1, 1980, by its president, Elmer Jonnet.

Further, the evidence is clear and convincing and this Court finds that the agreement of January 8 was the form used to create Exhibit 5C. The type styles of the bodies are the same and were prepared by Conrail. The same carbon impressions on the Jonnet January agreement appear on Exhibit 5C. Also, both exhibits bear the same square marks and two unusual lines which appear on pages 1 of each. Finally, the inserts on both the Jonnet January exhibit and Exhibit 5C bear identical carbon impressions.

Finally, the only person and entity who could benefit by the enforceability of Exhibit 5C is plaintiff and its president, Elmer Jonnet.

Thus we find by clear and convincing evidence that Exhibit 5C is a fraud, it does not represent plaintiff's true bid on July 1, 1980, it is material to this claim,

and that the fraud was intentionally perpetrated by plaintiff and its [22] president, Elmer Jonnet, who signed all documents including Exhibit 5C.

25. There is other evidence of a clear, convincing character which requires this Court to deny equitable relief sought by plaintiff in this case.

Although plaintiff has asserted that it is entitled to title to Penn Station by virtue of Exhibit 5C and that a final and binding agreement was executed on July 1, 1980, Mr. James J. Kelly testified that Elmer Jonnet contacted him subsequent to August 31, 1980, to enlist Kelly's aid in obtaining Management approval of plaintiff's offer.

Elmer Jonnet denied on three occasions under oath in this case to those entreatments.

James J. Kelly was a candid, forthright and truthful witness. He testified credibly, and his recollection was related to a specific instance in Midway, Pennsylvania.

We find that Conrail has established by clear and convincing evidence that Elmer Jonnet has testified falsely in this case with respect to the binding effect of his offer of July 1, 1980.

26. As Judge Aldisert has noted, "He who comes into equity must come with clean hands."

The doors of equity are closed to plaintiff, because the evidence is clear and convincing that plaintiff has attempted to perpetrate an egregious fraud upon Conrail [23] and others.

Moreover, plaintiff's equitable claims involve also the public interest. A historical landmark stands wasting because plaintiff has sought the aid of equity to impede the restoration of this venerable structure. The public and this community have suffered not only a delay, but perhaps an irreparable loss.

This Court will deny all equitable relief as sought by plaintiff in its complaint and the motion for injunctive relief to prevent a wrongdoer from enjoying the fruits of its and his transgression, but also to avert an injury to the public.

27. Because we have based our denial of equitable relief due to plaintiff's fraud on the parties, we need not reach the question of whether plaintiff's conduct constituted a fraud on the Court.

For a general discussion of that concept, see *Hazel Atlas Glass Company vs. Hartford Empire Company*, 322 U.S. 238 (1944), and 19 ALR Fed. 762.

28. The evidence of fraud upon the parties, as we have found, is clear and convincing. Reasonable minds could not disagree.

Although, as we have noted, Conrail has sustained its burden of proof, the record should also reflect that plaintiff presented no contradictory evidence.

[24] Indeed, an expert retained by Jonnet Development Corporation remained in court during the trial of this issue and conferred with Conrail's expert concerning the methodology of testing, and also conducted tests on her own. She was also given additional time by the Court to submit an opinion to plaintiff and testify, if it desired. In the end, plaintiff determined not to call Mary Metzler as a witness.

For the foregoing reasons, particularly that defendants have established by clear and convincing evidence that plaintiff attempted a fraud on the parties, the claim of plaintiff for equitable relief, including plaintiff's motion for preliminary and permanent injunctive relief, will be denied due to the doctrine of unclean hands.

29. To date, this Court has dealt only with the claim of plaintiff for expedited equitable injunctive relief. Since plaintiff has requested a subsequent jury trial on its

antitrust claim for damages, wherein plaintiff claims that it was the victim of an illegal conspiracy to deny it the right to construct a hotel at Penn Station, the Clerk will deliver to all counsel a Rule 5-II order with respect to pretrial discovery on the legal issues, and a jury trial will be conducted, if plaintiff desires, at a later date under the Sherman and Clayton Acts.

30. Finally, because this record contains serious allegations and evidence of criminal conduct, we will order [25] a copy of this transcript and all pleadings and papers to be forwarded to Robert Cindrich, United States Attorney for the Western District of Pennsylvania, for appropriate consideration.

A written order will follow.

Gentlemen, have I overlooked any issue?

MR. MANION: I would just like to make one comment on the jury trial issue, Your Honor.

I think that you have accurately summarized what occurred, but it occurred to me last night and again this morning that this issue is a feigned red herring, because, in light of the standard that we are held to to establish fraud, had the case been tried to a jury, the evidence as you have described it is so overwhelming that it would have required a directed verdict, that is, that no reasonable minds can disagree.

THE COURT: You are not without relief. A motion for summary judgment is appropriate.

Mr. Silvestri may decide not to proceed with the antitrust damages. A number of issues may arise along the road.

I specifically found that this was fraud on the parties. I did not reach the question of whether or not it was fraud on the Court.

MR. MANION: I appreciate Your Honor's comment [26] about future proceedings. I meant even as it applied to this proceeding. That contention, that it was strictly a—in light of the standard that we are held to, is strictly academic.

THE COURT: You may be right, but you can file the appropriate motions to address the Sherman and Clayton Act alleged violations.

Anything else?

Thank you very much.

(Proceedings adjourned at 10:30 a.m.)

Certified a true and correct transcript of Findings of Fact and Conclusions of Law at proceedings on June 16, 1981, before Honorable Donald E. Ziegler, District Judge.

/s/ Marilyn G. Brown
MARILYN G. BROWN
Official Reporter

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2182

JONNET DEVELOPMENT CORPORATION
Appellant

vs.

RICHARD S. CALIGUIRI; DAVID MATTER; PAUL BROPHY; GEORGE CHARLTON; ED DELUCA; LOUIS GAETANO; STEVE GEORGE; TED HARDY; BEN HAYLLAR; ROBERT LURCOTT; HIRAM MILTON; JOHN ROBIN; CITY OF PITTSBURGH; URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH; CONSOLIDATED RAIL CORPORATION, a/k/a CONRAIL; EDWARD G. JORDAN; GRANT-LIBERTY DEVELOPMENT GROUP, a/k/a HILTON INTERNATIONAL; VISTA INTERNATIONAL; THE BUNCHER COMPANY; JACK G. BUNCHER; MONDEV-BUNCHER STATION ASSOCIATION; and MONDEV INTERNATIONAL OF MONTREAL

Appeal From the United States District Court
For the Western District of Pennsylvania

(D.C. Civil Action No. 81-0421)

Argued January 11, 1982

Before HUNTER, HIGGINBOTHAM, *Circuit Judges* and ACKERMAN,* *District Judge*

---

* Honorable Harold A. Ackerman, United States District Judge for the District of New Jersey, sitting by designation.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ James Hunter, III
JAMES HUNTER, III
Circuit Judge

Attest:

/s/ Sally Mrvos
Clerk

Date Feb. 16, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2182

JONNET DEVELOPMENT CORPORATION,
Petitioner

v.

RICHARD S. CALIGUIRI, *et al.*

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by Jonnet Development Corporation in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ James Hunter, III
JAMES HUNTER, III
Judge

Dated: March 15, 1982

Office-Supreme Court, U.S.
FILED
JUL 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2274

IN THE

Supreme Court of the United States

October Term, 1981

JONNET DEVELOPMENT CORPORATION,
Petitioner,

v.

RICHARD S. CALIGUIRI, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

Whether the petition for a writ of certiorari presents a substantial Seventh Amendment question deserving the consideration of this Court where the issues are merely:

1. Whether the district court's findings of fact, as affirmed by the court of appeals, that petitioner had requested and consented to a non-jury hearing on its claims for equitable relief prior to a jury trial on its damages claim are "clearly erroneous"? and

2. Whether petitioner's jury trial argument is rendered moot by the district court's findings that the evidence of petitioner's fraud, forgery and perjury was so clear, precise and indubitable that reasonable minds could not disagree?

COUNTERSTATEMENT OF THE CASE

A. Reasons For This Counterstatement

The statement of the case set forth in the petition for writ of certiorari filed by Jonnet Development Corporation ("Jonnet") fails to state critical facts which respondents, Consolidated Rail Corporation ("Conrail") and its former Chairman, Edward G. Jordan ("Jordan"), believe are not only material to, but are dispositive of, the jury trial issue which Jonnet attempts to raise in its petition. Accordingly, respondents believe the Court is entitled to be informed of these facts.[1]

---

[1]The failure of petitioner to set forth these facts in its statement of the case cannot be excused on the ground that counsel of record in this Court was not counsel of record in the district court or in the court of appeals. For not only is co-counsel for petitioner fully aware of them but most of them appear in the Findings of Fact made by the district court which are attached as an appendix to Jonnet's petition. (1a-20a)

B. Petitioner's Written And Repeated Requests For A Non-Jury Hearing On Its Claim For Injunctive Relief Prior To A Jury Trial On Its Claim For Money Damages

The record establishes that Jonnet repeatedly requested and consented to a non-jury hearing on the merits of its claim for injunctive relief prior to a jury trial on its claim for money damages. Because the most clear and concise summary of the record evidence on this point may be found in the Findings of Fact made by the district court (Ziegler, J.), respondents set forth the relevant excerpts from those Findings, as follows:

> "4. Jonnet Development Corporation instituted this civil action on March 18, 1981, against 22 defendants, alleging a conspiracy to restrain construction of a hotel by plaintiff in the Pennsylvania Railroad Station Complex in Midtown Pittsburgh.
>
> "Plaintiff also instituted a number of state court actions in the Court of Common Pleas of Allegheny County, Pennsylvania, seeking specific performance, a constructive trust, and money damages.
>
> "The federal and state court equitable claims constitute a cloud on the title and ... have also prevented Consolidated Rail Corporation from scheduling a closing date and transferring title to the Urban Redevelopment Authority of Pittsburgh.
>
> "5. This case also has broad public interest connotations. All parties admit that the building is historically significant because it is a landmark and, due to its state of disrepair, it is wasting due to weather conditions.
>
> "6. In the complaint of the plaintiff, Jonnet Corporation seeks the following equitable relief at Paragraph 31:
>
> 'Voiding the Agreement of Sale between Defendant, CONRAIL, and Defendant, URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH,' and 'Enjoining Defendant, CONRAIL, and Defendant, URBAN

REDEVELOPMENT AUTHORITY OF PITTSBURGH, to convey the property of PENN STATION to Plaintiff.'

"The same requests for equitable relief are set forth in the WHEREFORE clause, namely, voiding the agreement of sale between Conrail and Urban Redevelopment Authority and enjoining the conveyance.

"7. Despite the teachings of *Beacon Theatres, Inc. vs. Westover*, 359 U.S. 500 (1959), plaintiff filed a motion for a preliminary injunction on April 7, 1981, alleging that legal relief was inadequate due to the existence of irreparable harm.

***

"8. At plaintiff's urging, a hearing was set for the earliest possible date, namely, May 26, 1981, at 10:00 a.m.

***

"9. Discovery had already commenced in the state court action in the case of plaintiff versis [sic] Consolidated Rail Corporation, GD No. 80-27589, and plaintiff continued its extensive efforts in this Court.

***

"10. On May 4, 1981, defendants, Consolidated Rail Corporation and Edward G. Jordan, filed a consolidated answer denying the averments of the complaint and, in a defense denominated as THIRTEENTH, averred as follows: 'As more fully set forth in the counterclaim hereto, Jonnet's claims in this action are founded upon a forged document which constitutes a fraud upon the Court.'

***

"11. On May 11, 1981, defendants, Jack D. Buncher and The Buncher Company, filed a motion to advance

and consolidate the trial on the merits with the motion of Jonnet for a preliminary injunction.[2]

"12. On May 20, 1981, Jonnet filed a motion to continue the hearing on the preliminary injunction. In its motion, Jonnet Development Corporation stated at Paragraph 9 as follows: 'With reference to BUNCHER's Motion. . .,[3] Plaintiff will consent to the same, provided that a new hearing date be set which would provide enough time to accomplish all depositions as aforementioned, together with the transcription of the same, together with time to inspect relevant documents and prepare for such a preliminary injunction hearing; it being understood that the purpose of the hearing will only be to determine the appropriateness of injunction as a remedy, with Plaintiff reserving the right to proceed to jury trial on the ultimate issue of antitrust law violations and damages.'

"13. On May 22nd, 1981, the Court granted the motion of Jonnet to continue the claim [sic] for equitable relief. The Court scheduled a hearing on plaintiff's request for equitable relief for June 8, 1981, at 10:00 a.m., at plaintiff's urging.

"The Court established a discovery schedule at the status conference of May 22nd, 1981, which would enable Jonnet Corporation to go forward on its claim for equit-

---

[2]The motion clearly stated that it was requesting a consolidated trial on the merits "with respect to the prayer for injunctive relief" and that this consolidated hearing on Jonnet's request for such relief "will not preclude the Plaintiff from proceeding at a later date with a jury trial on its Complaint for Damages." (C.A. App. 41, 43) On May 15, 1981, Conrail and Jordan filed a motion requesting a pre-hearing conference in which they joined in defendant Buncher's motion and pointed out that one of the defenses they would present at the injunction hearing was "that the agreement upon which plaintiff relies as the basis for its claim is a forgery and constitutes a fraud upon the Court." (*Id.* at 49, 50)

[3]The phrase omitted from this quotation from Jonnet's motion is "to Advance and Consolidate Trial on Merits With Hearing on Motion for Preliminary Injunction." (C.A. App. at 56)

able relief on June 8, 1981, and postpone until a later date the claim of Jonnet for damages under the Sherman and Clayton Acts before a jury.

"Moreover, a review of the exhaustive discovery undertaken by Jonnet Corporation prior to the hearing of June 8 indicates that plaintiff was able and willing to proceed with its equitable claim for relief at that time.

"14. On June 4, 1981, the Court conducted a second status conference at the request of the parties. The Court ordered that since plaintiff was seeking equitable relief prior to consideration by a jury of plaintiff's claim for antitrust damages, the court should hear evidence at the hearing on June 8 concerning the defense of Conrail that Jonnet Corporation had knowingly filed suit or was relying upon a forged document.

"At page 3 of the transcript, the Court stated: 'One of the issues in this case raised by the defendants as an affirmative defense is that there has been a fraud on the court in that certain documents were altered and certain perjurious testimony has been presented. The question of whether or not there has been a fraud on the court is important as to whether equitable relief would be granted, and therefore the court will hear on Monday, June 8, through Thursday, June 11, 1981, the testimony from all parties concerning the question of whether or not any documents have been altered.'[4]

"The transcript at page 7 indicates that Jonnet Corporation agreed to this procedural device to determine plaintiff's right to equitable relief.[5]

---

[4]As an accommodation to counsel for Jonnet who said that he needed additional time to conduct even further discovery on the merits of Jonnet's claim for injunctive relief (C.A. App. at 73-79), the court limited the hearing of June 8 to the fraud issue but made it clear that, in the event the respondents did not establish fraud at this hearing, Jonnet would be granted additional discovery on its claim for injunctive relief. (*Id.* at 85-88)

[5]As does the transcript at p. 2. (C.A. App. at 84)

"Further, it is obvious that since plaintiff was the party urging a trial on equitable relief prior to the antitrust claim for damages, and if Conrail established fraud by Jonnet Corporation by clear and convincing evidence, the equitable claims must be denied based on the equitable doctrine of unclean hands.

"Thus the use of Rule 42(b) was clearly appropriate under the circumstances, bearing in mind that Jonnet Corporation would litigate its legal issues before a jury at a later date, as urged by Jonnet from the outset.

"15. The foregoing facts make clear that the case of *Beacon Theatres vs. Westover*, 359 U.S. 500 (1959), is inapposite.[6]

"Plaintiff was the party that moved this Court to treat the equitable claim prior to adjudication by a jury of the legal issues for declaratory judgment and money damages. Plaintiff moved on two occasions for an advanced equitable hearing, and the Court set two dates for such a hearing, that is, May 22nd and June 8th, 1981.

"The use of Rule 42(b) with respect to plaintiff's claim for equitable relief was judicious, because if Conrail established the defense of unclean hands by clear and convincing evidence, plaintiff's claim for equitable relief must be denied.

"The transcript of June 8 makes clear the basis for our ruling, and Jonnet's motion for mandamus in the Court of Appeals and recusal to this Court is specious and without merit.

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[6]These facts, particularly this finding and Finding Nos. 7 and 11 through 14, as well as the court's ruling at the time it denied Jonnet's motion to impanel a jury (C.A. App. at 111-14), also clearly demonstrate that the district court did in fact base its denial of Jonnet's last minute motion to impanel a jury on Jonnet's repeated requests for, and consent to, a non-jury hearing on its claim for injunctive relief prior to a jury trial on its claim for money damages. The assertions to the contrary in Jonnet's petition (Pet. for Cert. at 14, 16) are simply false.

"The Court's ruling on June 8 concerning plaintiff's demand for a jury trial is also sound, since a bench trial is the proper means for adjudicating equitable claims which are pressed by a plaintiff at its specific request prior to consideration of the legal issues.

"The transcript of the proceeding on June 8 at pages 2 through 8 indicates that Jonnet Corporation will be accorded a trial by jury at a later date, if it desires, on its claims for declaratory relief and money damages." (Pet. at 3a-9a)

Thus, contrary to the statements in Jonnet's petition for a writ of certiorari, the record makes it pellucid that Jonnet repeatedly requested and consented, in writing and on the record, to a non-jury hearing on its claim for injunctive relief prior to a jury trial on its claim for money damages. Furthermore, on Friday, June 5, 1981, on the eve of that non-jury hearing, Jonnet filed a petition for a writ of mandamus in the United States Court of Appeals for the Third Circuit. In that petition Jonnet made no assertion whatsoever that the district court had denied or otherwise impaired its right to a jury trial but it merely requested a stay of the hearing pending further discovery.[7]

It was not until the start of the hearing of June 8, 1981 on the fraud issue, after Jonnet had reviewed the report of Conrail's document expert which made its fraud manifest, that Jonnet moved the district court to impanel a jury. (C.A. App. at 108-10) The court denied the motion for the reasons recited in its Findings of Fact, *supra*.[8] (C.A. App. at 111-14).

---

[7]The petition was summarily denied that same day. (C.A. App. at 103-04)

[8]On June 9, Jonnet filed a second petition for a writ of mandamus in the Third Circuit in which it requested an order mandating the district court to impanel a jury for the fraud hearing. (C.A. App. at 147-53) Again, the petition was denied summarily. (Order of June 11, 1981, Aldisert, J.)

Jonnet then moved to withdraw its request for equitable relief but refused to withdraw its claims for such relief in the related state court actions. (*Id.* at 115, 118-23) The district court then asked counsel for Conrail to summarize the evidence he would adduce on the fraud issue. (*Id.* at 123) Following counsel's summary (*id.* at 123-34), the district court ruled that Conrail's allegations raised serious questions for the executive and judicial branches of government, including an alleged affront to the integrity of the judicial process. (*Id.* at 133-34)

C. The District Court's Findings of Petitioner's Fraud

The hearing conducted by the district court on June 8, 1981 was, thus, limited to the narrow question whether Jonnet was guilty of such fraud or other inequitable conduct as to preclude the grant of equitable relief.[9] At the conclusion of that hearing, the district court dictated comprehensive and well-considered Findings of Fact and Conclusions of Law into the record. (Pet. for Cert., at 1a-20a) Among other findings, Judge Ziegler found that the document upon which Jonnet relied as the basis for its claim contains material and intentional alterations and is a fraud (*id.* at 14a); that the evidence supporting that conclusion is clear, convincing, precise and indubitable (*id.* at 15a-16a); that reasonable minds could not disagree as to that conclusion (*id.* at 18a); that the fraud was intentionally perpetrated by Jonnet and its President, Elmer Jonnet (*id.* at 16a-17a); that Mr. Jonnet had testified falsely in this case on three separate occasions in furtherance of the fraud (*id.* at 17a);

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[9] As the district court stated at that hearing and thereafter, Jonnet's claim for damages under the antitrust laws, as well as Conrail's counterclaim, remain for trial before a jury or non-jury, in accordance with the demands of the parties. (C.A. App. at 112, Finding of Fact No. 15, *supra*, Pet. for Cert. at 9a). Indeed, following the hearing on the fraud issue, the district court established a discovery schedule on these claims and trial of them awaits only this Court's ruling on Jonnet's petition for a writ of certiorari. (C.A. App. at 214, App. to this Brief at 28b-30b)

that Jonnet was guilty of such unclean hands as to require denial of all equitable relief (*id.* at 17a-18a); and that, because this record contains serious allegations and evidence of criminal conduct, the court would order a copy of the transcript and all pleadings and papers forwarded to the United States Attorney for the Western District of Pennsylvania for appropriate consideration (*id.* at 19a).

Accordingly, the district court entered an order denying all of petitioner's claims for equitable relief with prejudice.[10] It is from the entry of judgment pursuant to that order that Jonnet appealed to the United States Court of Appeals for the Third Circuit. And it is from that court's judgment order of affirmance and its denial of rehearing (Pet. for Cert. at 22a-23a), that Jonnet has filed the instant petition for a writ of certiorari.

D. Jonnet's Trial Strategy As Reflected By Its Counsel's Petition To Withdraw His Appearance

Following the decision of the district court and the filing of Jonnet's appeal to the Third Circuit, trial counsel for Jonnet filed a petition to withdraw his appearance in the district court. In that petititon, counsel stated that he had not presented a substantive defense to Conrail's allegations of fraud, forgery and perjury but had "only presented technical defenses and legal arguments relating to Seventh Amendment rights to jury trial and the relevancy and materiality of the alleged document alteration." Counsel further stated that he had discontinued Jonnet's state court suit against Conrail because that suit "had attached to it and advanced to the Honorable State Court the document which was found to be forged by Elmer Jonnet." Counsel concluded that, as an officer of the court and as one bound by the Code of Professional Responsibility, he could not further represent petitioner or Elmer Jonnet. The district

[10]Because Jonnet failed to attach to its petition a copy of the order which was the subject of its appeal to the Third Circuit, respondents have attached a copy of that order in the Appendix to this Brief at 1b-2b.

court granted counsel's petition and Jonnet's appeal was thereafter prosecuted by new counsel.

In his brief in the court of appeals, new appellate counsel for Jonnet argued that trial counsel had declined to call Elmer Jonnet or an expert witness to testify at the fraud hearing in the district court because of the absence of a jury and the lack of opportunity for adequate preparation. (Brief for Appellant in the court of appeals at 12) At oral argument, that court questioned counsel for Jonnet on the inconsistency between his argument in that court and the facts of record, including those set forth in trial counsel's petition to withdraw. (Tr. of Argument, attached in Appendix to this Brief at 9b-10b, 13b-14b)

For Jonnet's trial counsel had represented to the district court at the hearing in that court that he had no substantive evidence whatsoever to offer on the fraud issue, except Mr. Jonnet's denial that he had altered the document in question. (C.A. App. at 160-61) Further, the record makes it clear that both Mr. Jonnet and his expert witness had ample opportunity to prepare and to testify. (C.A. App. at 172-73, 214) The real reason for their failure to do so is apparent from trial counsel's petition to withdraw from the case: their knowledge that the document was a fraud presented serious Fifth Amendment problems for Mr. Jonnet had he taken the stand and equally serious ethical problems for his counsel had he permitted Mr. Jonnet to do so.

Notwithstanding these record facts, new counsel for Jonnet in this Court continues to suggest that the absence of a jury was the reason for trial counsel's decision not to put Mr. Jonnet or Jonnet's expert witness on the stand. (Pet. for Cert. at 9, n. 5)

E. Proceedings In The Court of Appeals

Following the filing of comprehensive briefs in the Third Circuit, the case was argued before a panel of that court

consisting of Circuit Judges Hunter and Higginbotham and District Judge Ackerman on January 11, 1982. (Pet. for Cert., 21a) On February 16, 1982, that court entered a judgment order affirming the order of the district court. (*Id.* at 22a) On March 15, 1982, the full court denied Jonnet's petition for rehearing. (*Id.* at 23a)

In its petition for certiorari, Jonnet argues that the court of appeals did not give adequate consideration to its jury trial argument and that its decision is contrary to interpretations of the Seventh Amendment by this Court and by other circuit courts. An examination of the transcript of the oral argument before the court of appeals, however, a copy of which is attached in the Appendix to this Brief at 3b-25b, utterly belies this argument. For as that transcript makes manifest, the court of appeals gave full and understanding consideration to Jonnet's argument. Its affirmance of the district court was based upon the fact that the record fully supports the district court's findings that petitioner had requested and consented to the non-jury hearing in question. Accordingly, that ruling does not constitute a decision of broad, constitutional application. In light of the abundant evidence in the record in support of the district court's findings, the Third Circuit's judgment order of affirmance was not merely proper but was the most appropriate instrument of adjudication for such an ordinary sufficiency of the evidence question.

F. Petitioner's Pending Motion To Dismiss Its Claim For Damages In The District Court

During the pendency of petitioner's appeal to the Third Circuit and its petition for writ of certiorari in this Court, and pursuant to pretrial orders of the district court, the parties have been conducting discovery and other pretrial proceedings on petitioner's claim for money damages and on respondents' counterclaim for fraud, abuse of process and related torts. Under the latest pretrial order of the district court, the time for

discovery has expired, pretrial statements have been filed, and various motions to dismiss and for summary judgment on petitioner's claim are pending before Judge Ziegler. The district court and the parties are awaiting only this Court's ruling on Jonnet's petition for writ of certiorari before proceeding to trial of these damages questions.

It was in this context that the district court scheduled a pretrial conference for June 28, 1982. Prior to that conference new trial counsel for Jonnet had circulated to the district court and to counsel a proposed motion to dismiss petitioner's claim for damages pursuant to Fed.R.Civ.P. 41. At the pretrial conference, counsel for Jonnet requested the court to delay consideration of that motion until this Court has ruled upon Jonnet's petition for writ of certiorari, but counsel committed petitioner to dismissal of the damages claim, whether this Court grants or denies certiorari. See the excerpts from the Transcript of Proceedings of Pretrial Conference which are attached hereto at 26b-31b.[11] Thus, even should this Court grant Jonnet's petition for writ of certiorari and reverse the judgment of the Court of Appeals, Jonnet has committed itself to dismissing the damages claim which was the basis for the demand for a jury trial in its complaint.

ARGUMENT

I. THIS CASE PRESENTS NO SUBSTANTIAL SEVENTH AMENDMENT QUESTION BUT MERELY THE MUNDANE ISSUE WHETHER THE RECORD ADEQUATELY SUPPORTS THE DISTRICT COURT'S FINDINGS THAT PETITIONER HAD REQUESTED AND CONSENTED TO THE NON-JURY HEARING IN QUESTION.

The record establishes that petitioner repeatedly requested and urged the district court, in writing and on the

[11] Respondents were advised by the Clerk of this Court that they need not file a motion to supplement the record in this Court with this transcript or the transcript of the argument in the Court of Appeals but could merely attach a copy of the relevant excerpts from them in the Appendix to this Brief.

record, to grant it an expedited non-jury hearing on its claim for injunctive relief prior to a jury trial on its claim for money damages. In accordance with these requests, and with petitioner's written consent, the district court held a non-jury hearing which it ultimately limited to the narrow issue whether petitioner's fraudulent conduct in the prosecution of this action precluded any award of equitable relief to it. Thus, the narrow question presented by petitioner's appeal to the court of appeals, and by its petition for a writ of certiorari in this Court, is whether the record supports the district court's findings that petitioner had requested and consented to such a hearing.

The facts supporting this conclusion have been fully set forth in the counterstatement of the case, *supra*, and need not be repeated here. Suffice it to say that they fully support—indeed they compelled—the findings made by the district court. Certainly, these findings are not "clearly erroneous" nor based upon an error of law, the standard of review for a district court's findings under Fed.R.Civ.P. 52(a). *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

Accordingly, as the district court ruled, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), and its progeny are simply inapposite to the facts of this case. As this Court pointed out in that case, 359 U.S. at 510, a right to a jury trial can be dispensed with "by the assent of the parties entitled to it." Here, that right has not been dispensed with but has merely been deferred in accordance with petitioner's repeated requests and consent. The courts of appeals have affirmed findings of consent to a non-jury hearing on the merits of equitable claims on much more equivocal evidence of such consent than the evidence in this case.

For example, in *Fenstermacher v. Philadelphia National Bank*, 493 F.2d 333 (3d Cir. 1974), the district court held a hearing four days after the filing of the complaint on plaintiff's request for preliminary injunctive relief and announced at the

conclusion of that hearing that it would be deemed to have been a consolidated hearing pursuant to Fed.R.Civ.P. 65(a)(2). Although plaintiff apparently had not received advance notice of the consolidated nature of the hearing, he submitted a brief and proposed order in support of his request for equitable relief. On appeal of the denial of his claims, plaintiff argued that the district court had improperly denied him a right to a jury trial. The United States Court of Appeals for the Third Circuit (Biggs, C.J.), recognizing that a right to jury trial cannot be lost through determination of equitable claims, citing *Beacon Theatres*, nonetheless found that plaintiff had waived that right by his conduct. 493 F.2d at 338.

A similar result was reached in *Southland Reship, Inc. v. Flegel*, (Tuttle, J.), 534 F.2d 639, *rehearing denied*, 539 F.2d 710 (5th Cir. 1976). The district court, pursuant to Fed. R.Civ.P. 65 (a)(2), ordered a consolidated hearing on the merits of plaintiff's claim for equitable relief, after which a jury trial would be held on plaintiff's damages claim. The conduct of counsel for the parties at the hearing manifested their understanding of the nature of the consolidated hearing. Thus, the United States Court of Appeals for the Fifth Circuit ruled that plaintiff by its actions had acquiesced in a non-jury trial on the merits of its claim and had thereby waived its right to a jury trial. 534 F.2d at 644-45.

Thus, in both *Fenstermacher* and *Southland* a finding of waiver was based upon the conduct of the respective plaintiffs from which the courts implied a waiver of a right to a jury trial. Here, petitioner expressly agreed in writing to a non-jury trial on the merits of its claim for equitable relief prior to a jury trial on its claim for money damages. Further, that agreement was reiterated in at least two pretrial conferences immediately prior to the hearing and by petitioner's entire course of conduct in preparation therefor.[12]

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[12]Nor are *Bowles v. Bennett*, 629 F.2d 1092 (5th Cir. 1980) and *Heyman v. Kline*, 456 F.2d 123 (2d Cir.), *cert. denied*, 409 U.S. 847 (1972), cited by

(Continued)

In these circumstances, petitioner's last-minute attempt at the start of the hearing to retract its express agreement to a non-jury hearing and to demand a jury trial was ineffectual. *E.g., Hanlon v. Providence College*, 615 F.2d 535, 538-39 (1st Cir. 1980); *General Business Services, Inc. v. Fletcher*, 435 F.2d 863, 864 (4th Cir. 1970) (per curiam); *West v. Devitt*, 311 F.2d 787,788 (8th Cir. 1963) (per curiam); 5 *Moore's Federal Practice*, ¶ 38.45 (2d Ed. 1981). In short, a litigant cannot demand a jury trial after having agreed to submit the matter to the court for determination.

Likewise, where a demand for a jury trial is made on the "eve of trial," it is not an abuse of discretion for the trial court to deny the motion. *E.g., Mesa Petroleum Co. v. Coniglio*, 629 F.2d 1022 (5th Cir. 1980); *Omawale v. WBZ*, 610 F.2d 20 (1st Cir. 1979) (per curiam). Similarly, a belated jury trial demand will not be honored where, as in the present case, it would delay resolution of the issues and is advanced as part of a "pattern of delay," *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581, 585 (8th Cir.), *cert. denied*, 445 U.S. 945 (1980), or to accommodate a party's "change in strategy" or "end run around its effective waiver of a jury trial," *Reefer Express Lines Pty., LTD. v. Arkwright—Boston Manufacturers Insurance Co.*, 87 F.R.D. 133, 135 (S.D.N.Y. 1980).

The foregoing considerations apply as well to the district court's denial of petitioner's last-minute attempt to withdraw its claim for equitable relief at the hearing on that claim. This delaying tactic would have severely prejudiced respondents by postponing resolution of the issue of plaintiff's fraud and would have continued the cloud on title to the property to the detriment of the public as well as respondents.

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petitioner (Pet. for Cert. at 15) in conflict with these cases. Indeed, they underscore respondents' point that this question is not one of far-reaching constitutional implication but is merely dependent upon the particular facts of each case.

Thus, the ruling of the district court in this case, and the affirmance of it by the court of appeals, is entirely consistent with the principles established by this Court in *Beacon Theatres*. The United States Court of Appeals for the Third Circuit has long recognized and followed the teachings of *Beacon Theatres* and has not hesitated to require compliance with its requirements in appropriate cases through the exercise of that court's mandamus powers. *E.g., Eldredge v. Gourley*, 505 F.2d 769 (3d Cir. 1974). In the instant case, however, there simply is no factual basis for the application of the jury trial requirements of *Beacon Theatres* because petitioner expressly requested and consented to the non-jury trial in question.

II. THE DISTRICT COURT'S FINDINGS THAT THE EVIDENCE OF JONNET'S FRAUD WAS SO OVERWHELMING THAT REASONABLE MINDS COULD NOT DISAGREE RENDERS MOOT PETITIONER'S JURY TRIAL ARGUMENT.

As previously stated, at the conclusion of the hearing on the issue of Jonnet's fraud, the district court made findings of fact and conclusions of law in which it found that the document upon which Jonnet relied as the basis for its claim contains material and intentional alterations and is a fraud (Pet. for Cert. at 14a); that the evidence supporting that conclusion is clear, convincing, precise and indubitable (*id.* at 14a-17a); *that reasonable minds could not disagree as to that conclusion* (*id.* at 18a); that the fraud was intentionally perpetrated by petitioner and its President, Elmer Jonnet (*id.* at 16a-17a); that Mr. Jonnet had testified falsely in this case on three separate occasions in furtherance of the fraud (*id.* at 17a); and that petitioner was guilty of such unclean hands as to require denial of all equitable relief (*id.* at 17a-18a).

Under Fed.R.Civ.P. 50(a), a district court is required to direct a verdict if it determines that the evidence is such that reasonable minds could not reach a different result. *E.g., Tar-*

boro v. Reading Co., 396 F.2d 941 (3d Cir. 1968), *cert. denied*, 393 U.S. 1027 (1969). The district court, having determined that the evidence of Jonnet's fraud was so overwhelming that reasonable minds could not disagree, would have been compelled to direct a verdict had this case been tried to a jury. Thus, the district court's denial of Jonnet's motion to impanel a jury could not possibly constitute prejudicial or reversible error in this case.[13] *E.g.*, *Cox v. C. H. Masland & Sons, Inc.*, 607 F.2d 138, 144-45 (5th Cir. 1979); *Monroe Auto Equipment Co. v. Heckethorn Mfg. & Supply Co.*, 332 F.2d 406, 412 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964); *Black, Sivalls & Bryson, Inc. v. Keystone Steel Fabrication, Inc.*, 584 F.2d 946, 949-50 (10th Cir. 1978); 7 *Moore's Federal Practice*, ¶ 61.06 (2d Ed. 1979).

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[13]Because Jonnet's petition for a writ of certiorari must be denied on this ground of mootness, as well as the ground of Jonnet's consent to a non-jury hearing, the Court need not decide whether Jonnet's pending *voluntary* motion to dismiss its damages claim in the district court also makes moot its petition.

CONCLUSION

For these reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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Counsel for Respondents, Consolidated Rail Corporation and Edward G. Jordan

RULE 28.1 CERTIFICATE

Respondent Consolidated Rail Corporation advises the Court pursuant to Rule 28.1 that it has no parent company and that it owns stock in the following subsidiaries (except wholly owned subsidiaries) or affiliates:

The Akron and Barberton Belt Railroad Company
Albany Port Railroad Company
The Belt Railway Company of Chicago
Calumet Western Railway Company
The Canada Southern Railway Company
Chicago and Western Indiana Railroad Company
Fruit Growers Express Company
Indiana Harbor Belt Railroad Company
The Lake Erie and Eastern Railroad Company
The Lakefront Dock and Railroad Terminal Company
The Monongahela Railway Company
The Niagara River Bridge Company (a wholly owned subsidiary of The Canada Southern Railway Company)
Nicholas, Fayette and Greenbrier Railroad Company
Peoria and Pekin Union Railway Company
Pittsburgh, Chartiers Youghiogheny Railway Company
Terminal Railroad Association of St. Louis
The Toledo Terminal Railroad Company
Trailer Train Company

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JONNET DEVELOPMENT CORPORATION,
Plaintiff,

vs.

RICHARD S. CALIGUIRI; DAVID MATTER; PAUL BROPHY; GEORGE CHARLTON; ED DeLUCA; LOUIS GAETANO; STEVE GEORGE; TED HARDY; BEN HAYLLAR; ROBERT LURCOTT; HIRAM MULTON; JOHN ROBIN; CITY OF PITTSBURGH: URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH; CONSOLIDATED RAIL CORPORATION, a/k/a CONRAIL; EDWARD G. JORDAN; GRANT-LIBERTY DEVELOPMENT GROUP, a/k/a HILTON INTERNATIONAL; VISTA INTERNATIONAL; THE BUNCHER COMPANY; JACK G. BUNCHER; MONDEV-BUNCHER STATION ASSOCIATION; and MONDEV INTERNATIONAL OF MONTREAL,
Defendants.

Civil Action 81-421

ORDER OF COURT

AND NOW, this 16th day of June, 1981, in accordance with the findings of fact and conclusions of law of record,

IT IS ORDERED that all claims of plaintiff, Jonnet Development Corporation, for equitable relief be and hereby are denied with prejudice.

../s/ DONALD E. ZIEGLER...
Donald E. Ziegler
United States District Judge

cc: John M. Silvestri, Esq.
Paul A. Manion, Esq.
Arthur J. Schwab, Esq.
D. R. Pellegrini, Esq.
Leonard M. Mendelson, Esq.
Robert M. Brown, Esq.
Joseph W. Conway, Esq.
John M. Feeney, Esq.
Michael C. Hanzel, Esq.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2182

JONNET DEVELOPMENT CORPORATION,
Appellant,

v.

RICHARD S. CALIGUIRI, et al.,
Appellees.

United States Courthouse
Philadelphia, Pennsylvania

Oral Argument

January 11, 1982

BEFORE:

HONORABLE JAMES HUNTER, III
HONORABLE A. LEON HIGGINBOTHAM, JR.
HONORABLE HAROLD A. ACKERMAN

PRESENT:

MICHAEL R. LEMOV, Esquire
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AND BUCKLEY, CHTD.
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Counsel for Appellant

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MANION, ALDER & COHEN
718 Fifth Avenue
Pittsburgh, Pennsylvania 15219
Counsel for Appellees

PROCEEDINGS:

MR. LEMOV: May it please the Court, I am Michael Lemov. I am counsel for Jonnet Development Corporation, the plaintiff-appellant in this case.

This is an action under the Sherman and Clayton Anti-trust Acts for treble damages, legal relief. Plaintiff moved for a preliminary injunction. This is an appeal from an order and judgment at the United States District Court for the Western District of Pennsylvania denying plaintiff's demand for a jury trial and motion for a jury trial.

JUDGE HUNTER: Before you get started, it seems to me that I picked up something in the newspapers of recent developments in this litigation. Does that have any bearing on the argument here today?

MR. LEMOV: None whatsoever. As far as I know, the case stands in a posture that—

JUDGE HUNTER: Nothing is moot?

MR. LEMOV: Nothing is moot, sir.

JUDGE HUNTER: Let me hear from the other table.

MR. MANION: Your Honor, my name is Paul Manion, and I represent Consolidated Rail Corporation and Edward Jordan, its former Chairman.

We think that there are recent developments which bear upon the argument here today.

JUDGE HUNTER: Are you prepared to touch on them in your argument?

MR. MANION: Yes, I am, Your Honor.

JUDGE HUNTER: All right. The appellant says there is no recent development that affects it, and the appellee is going to say that there is.

That's not going to make this case moot; is it?

MR. LEMOV: The issue here, Your Honor, is a fundamental constitutional question. This is a one-issue appeal. You probably heard that before. This time it's true. One issue, Seventh Amendment right to a jury trial.

There is a line of cases, starting with Beacon Theatres versus Westover, United States Supreme Court; followed by Dairy Queen; Ross versus Bernhard.

This Court reiterated them clearly and described how a District Court should handle this kind of case.

In Eldredge versus Gourley, just a few years ago—

JUDGE ACKERMAN: Predecessor counsel handled it on May 20.

MR. LEMOV: That's it, yes. Counsel in his responsive pleading to their motion to consolidate the preliminary injunction with the hearing on the merits expressly reserved the right to a jury trial in writing.

JUDGE ACKERMAN: On what?

MR. LEMOV: On all issues that might come before the Court in a hearing, sir.

JUDGE ACKERMAN: "Plaintiff reserving the right to proceed to jury trial on the ultimate issue of antitrust violations and damages."

Did I read that wrong, Counsel?

MR. LEMOV: You read that correct, I believe, Your Honor.

JUDGE ACKERMAN: I thought you said "all issues." Perhaps I didn't hear you.

MR. LEMOV: I don't understand the distinction you're making, Your Honor.

JUDGE ACKERMAN: You say in your brief that counsel has a right, under the Seventh Amendment, to a jury trial on the issue of fraud.

MR. LEMOV: Yes, sir.

JUDGE ACKERMAN: The contention here by your adversary is that he waived it. And I'm asking you whether in that statement didn't he reserve his right to a jury trial on the issue I just read.

MR. LEMOV: First of all, Your Honor, you have to realize that prior to that document on the twenty-second in response to a motion, there was a demand in the Complaint for a jury trial on all issues.

JUDGE ACKERMAN: At that time, in the motion, the plaintiff said, the last four lines: "It being understood that the purpose of the hearing will only be to determine the appropriateness of injunction as a remedy, with plaintiff reserving the right to proceed to jury trial on the ultimate issue of antitrust law violations and damages."

MR. LEMOV: It's our contention that one of the issues tried by the Court was a part of the plaintiff's case on damages and antitrust violations.

JUDGE HIGGINBOTHAM: Counsel, what was supposed to be tried on this preliminary injunction?

MR. LEMOV: The probability of success on the merits. The classic preliminary injunction issues. Probability of success on the merits and irreparable injury to the plaintiff.

Your Honor, if I may say this. The District Court did not mention the scope of the hearing that it had until June 4, long after this pleading was filed.

At the time this pleading was filed, for all anyone knew, this was a general hearing on a preliminary injunction request.

And I believe this pleading, coupled with the demand in the Complaint, adequately preserved the right to a jury trial subsequent to the preliminary injunction hearing. And that's the probability of success on the merits.

If you look at the findings that this trial Court made after the bench trial, they are not preliminary injunction findings. They do not say there is no probability of success on the merits. They say that there is no contract here, that there is perjury, that there is fraud in the contract. Those are ultimate findings for a jury under our jurisprudence, under a legion of cases.

JUDGE HIGGINBOTHAM: Can you help me? Suppose a judge has a contract, which is what this case starts out as. And if you need the contract in your preliminary injunction and if you find that this contract has been forged, as the District Court judge found here, and fraudulently altered, what is the District Court judge supposed to do?

Is he supposed to not find forgery and not find fraud because you have a jury trial right later on?

MR. LEMOV: The Supreme Court dealt with that issue in detail. It says the first thing you do is try the legal issues and thereafter the Court hears the injunction issue.

JUDGE HIGGINBOTHAM: Wasn't fraud, forgery, perjury inherently involved in the preliminary injunction case?

MR. LEMOV: No, sir, I do not believe that's the case. In fact, if that's the case—

JUDGE HIGGINBOTHAM: No forgery was involved in the preliminary injunction case? Because weren't you relying on a contract?

MR. LEMOV: No. This is an antitrust case based not on a contract, but on the statutory right to damages under the Antitrust Act.

JUDGE HIGGINBOTHAM: Weren't you originally going for an injunction in order to require the railroad to turn over the property to you in accordance with what you thought was the contract?

MR. LEMOV: Plaintiff never submitted a contract in this case. It was defendant that raised the contract. The contract was never raised in this federal case because it's an antitrust claim, treble damages, an action at law. The jury trial is an essential element of that action at law according to Justice Black in Beacon, followed in Dairy Queen, followed in this Circuit.

JUDGE ACKERMAN: At one point, you wanted an injunction.

MR. LEMOV: Yes, because of a probable violation of the antitrust laws, not a contract.

JUDGE ACKERMAN: But you wanted an injunction, equitable relief?

MR. LEMOV: Yes, sir, preliminary.

JUDGE ACKERMAN: Preliminary injunction. And to get equity you have to come in with clean hands; right?

MR. LEMOV: Yes, but equity could have been denied.

JUDGE ACKERMAN: And fraud bears on that; doesn't it?

MR. LEMOV: Yes, Your Honor, that's right, except the Federal Rules—Rule 38 says that jury trial shall be preserved inviolate. Rule 39 on jury trial requires the jury trial right—

The Federal Rules are very eloquent. But in this case, to use the world "inviolate", it's a very strong word. But that jury trial right was not preserved inviolate in this case, and I will tell you why.

The reason is that the conspiracy alleged by the plaintiff was a conspiracy which was a reaction to his submitting a bid and getting a bid on his property. He could not defend himself in the so-called equitable hearing without getting into the question of who else might have the motivation to alter the contract.

JUDGE HUNTER: As a matter of mechanics, this came up in part in connection with a request by the railroad for a pretrial conference; right? That was in that request. The railroad specifically stated that the fraud defense would be raised in the claims for equitable relief. That's your injunction; right?

JUDGE ACKERMAN: Paragraph 6, doesn't it say, "In addition, defendants must be given an opportunity to present their defenses to plaintiff's claim, including the defense that the agreement upon which plaintiff relies as the basis for its claim is a forgery and constituted a fraud?"

I am reading from Conrail's motion for a prehearing conference, dated May 15, 1981.

MR. LEMOV: How many times does one have to ask for a jury trial right under the Constitution of the United States, to have it preserved on a crucial issue in a legal case?

The crucial issue in the case was: Was there a conspiracy to make sure the plaintiff couldn't build a hotel on the Penn Station property? That's the key issue.

Now, hear me out on this one. If the plaintiff was to defend against this argument that he submitted a false contract and sued on a false contract—on its face a rather strange argument—he had to assert in response to this fraud argument that there was no forgery and maybe the contract was collated improperly in the office of Conrail with their officers sitting there.

JUDGE ACKERMAN: Why wasn't Miss Metzler put on?

She had a week to make that contention. And as I read Mr. Silvestri's affidavit filed with this Court, he made a conscious decision not to present her.

Now, I know it must be embarrassing, but I ask that question.

MR. LEMOV: It's a pleasure that you're asking. It's not embarrassing at all.

Miss Metzler was faced with chemical testing which she was not capable of doing. She needed a second expert. Plaintiff's counsel did not learn until the trial that there was chemical testimony here. He had to go and get another expert. He couldn't do that over the weekend, even though he worked until 12:30 at night, according to his statement.

Individual counsel here, against most of the establishment law firms of the City of Pittsburgh, against the Mayor of the City of Pittsburgh, in a politically-charged atmosphere, counsel was asked to come up with a rebuttal and evaluation in approximately 48 hours without a chemical expert. That's one thing.

Secondly, Miss Metzler asked for three weeks.

The defendants had possession of the alleged forged document for more than three weeks in the pre-trial proceedings. They had them examined by experts all over the country.

It is clear, furthermore, that the real reason, one of the major reasons—I wouldn't say the real reason—why Miss Metzler was not put on and why the plaintiff's president never testified was there was a tremendous threat by the trial Court.

He stated before the trial even started: This may be appropriate for the United States Attorney or the Executive Branch.

That was absolutely—

JUDGE HUNTER: If there was perjury involved or fraud involved, wasn't it appropriate for the United States Attorney?

MR. LEMOV: Without question. It was appropriate for a jury to determine first, and later the Court could have done whatever it wanted. It could have had a second hearing and at that time held contempt, referred the matter—

The reason the appellant stood on its rights, constitutional rights to a jury trial was it was obvious the judge had already ruled against it.

JUDGE ACKERMAN: Did it stand on its rights, or did it by consenting to the application for that pre-trial order and by its own motion segregate out, if you will, the problem of the injunction and their defense to it and agree, to over-simplify it, to try that without a jury. That did not happen?

MR. LEMOV: Let me address that. No, sir, it did not happen. Let me, first of all, put it in context.

The Supreme Court in Aetna versus Kennedy said that the jury trial is such a fundamental right that—

JUDGE ACKERMAN: I asked why it didn't happen.

MR. LEMOV: There is no case cited in the appellees' brief—

JUDGE ACKERMAN: It didn't happen here?

MR. LEMOV: No, it didn't happen here.

Rule 39 of the Federal Rules, because of the graveness of the right of a jury trial, requires that a withdrawal of a demand in a Complaint, such as in this case, must be by stipulation in open Court or in writing between the parties.

It can in no way be interpreted to be a stipulation because it was conditioned by the words "with plaintiff reserving the right to proceed to jury trial on the ultimate issue of antitrust law violations."

The fraud issue goes to the law violations. It's absolutely a part of them. Because they are conspirators. They are the only other people who had a motive to alter the contract.

How could the plaintiff possibly defend itself against the fraud argument in a so-called pre-trial hearing without saying, "They did it; I didn't do it?"

JUDGE HIGGINBOTHAM: Can you help me a little on this?

MR. LEMOV: Yes, sir.

JUDGE HIGGINBOTHAM: Part of your fraud issue comes in terms of whether a bid had been submitted for an agreement of sale that was signed. Am I correct on that?

MR. LEMOV: The fraud issue comes—

JUDGE HIGGINBOTHAM: It involves at least that issue.

MR. LEMOV: That's right. We said so. We had a valid contract, the culmination of which was blocked by a conspiracy.

JUDGE HIGGINBOTHAM: As I read through your motion for your preliminary injunction, you speak in terms of, at paragraph two, they are entitled to receive the title because they were the highest bidder.

Now, in order for the Court to understand how they were the highest bidder and in order for the Court to understand the agreement of sale which you plead in paragraph ten, how can you say the District Court could avoid getting to the fraud issue and making findings on it?

MR. LEMOV: The only thing the District Court had to find was, in one simple finding, there was not a probability of success on the merits or there was no irreparable injury. It did not have to get into the findings which it made.

JUDGE HIGGINBOTHAM: Then what would come up—a very, very able lawyer, not as talented as you but good nevertheless, would come up and say, "The Court has given us a conclusion of probability of success. What were the facts?"

And we send it back and say, "District Judge, what were the facts?"

And then he says, "Fraud."

MR. LEMOV: Well, this issue has been dealt with repeatedly by the Courts. The situation is that the District Court would either empanel a jury on the—if it felt it had to go into a fraud issue, it could have a jury on the fraud issue under Rule 32, ordering the trial. It could have had a single-issue jury and then gone on to the major trial on the antitrust claim. That's one approach.

The second approach would be simply to defer the equitable question. I deny your request or offer the option to your request.

JUDGE HIGGINBOTHAM: Yes, but what reason?

MR. LEMOV: Wait. Now get to the merits.

He could have said to me if I was there: "Counselor, the jury trial was very fundamental. But if you go on to the preliminary injunction hearing, you are risking involving ultimate issues of law and maybe your right. Now take a choice."

The Court didn't do that. In fact, the Court never told them what the hearing was until weeks later after this. On the fourth of June, suddenly the Court pulled out the fraud issue. Counsel was literally overwhelmed and unprepared. He did not put his client on. He never had a fair trial on this issue.

JUDGE ACKERMAN: Just a moment, Mr. Lemov. Did I understand you to say a little while ago that Miss Metzler did not have enough time?

MR. LEMOV: That is our contention, sir.

JUDGE ACKERMAN: Do you have the record, page 173?

MR. LEMOV: Yes, sir, I do.

JUDGE ACKERMAN: Did she say it would take her fifteen to twenty hours?

MR. LEMOV: She also said she needed a chemical expert.

JUDGE ACKERMAN: Counsel, does the record reflect that it would take her fifteen to twenty hours?

MR. LEMOV: It says, "at least." That's right. At least fifteen to twenty hours.

JUDGE ACKERMAN: Didn't she have from Tuesday, June 9 until 1:30 p.m. the following Monday?

MR. LEMOV: She had that time, yes, sir. But she did not have a chemical expert available at that time.

JUDGE ACKERMAN: I assume we can take judicial notice of the fact that that's more than fifteen to twenty hours, if you will forgive my facetiousness.

JUDGE HIGGINBOTHAM: It may not be in Pittsburgh. The days go slower there.

MR. LEMOV: I shall only say, Your Honor, that all of this has been in the context of a proceeding that should have gone to a jury under the Seventh Amendment.

Thank you. I think my time has expired.

I would like to reserve one or two minutes, if I may.

MR. MANION: May it please the Court, my name is Paul Manion, and I'm counsel for Consolidated Rail Corporation and Edward Jordan.

Other counsel for the Urban Redevelopment Authority and for certain of the other individual defendants that Elmer Jonnet sued, some 24 individuals, are here, and they are available to answer any questions. But I am to undertake the task of representing the appellees.

At the outset, if I may, Your Honors, for Mr. Lemov to suggest that the contract was not a part of this antitrust case is just outlandish. Perhaps it's because he wasn't at the trial or he hasn't looked at the Complaint.

But as you pointed out, Judge Higginbotham, it was in the case from the beginning. It was in paragraph ten of the Complaint. The request was for injunctive relief. You read this Complaint, and what he is seeking is an injunction against Conrail's transfer of the property to the Urban Redevelopment Authority for a redevelopment project and that the Court affirmatively order that it be transferred to him pursuant to this fraudulent contract.

So to suggest that it wasn't in the case from the beginning is just false.

Secondly, when you read what Mr. Silvestri at the pretrial conference stipulated to, Beacon Theatres, Dairy Queen and that whole line of cases becomes totally inapposite because—

JUDGE HIGGINBOTHAM: Do you have the citation?

MR. MANION: Yes, at page 56.

This wasn't a preliminary injunction hearing, Your Honors. He had moved for a preliminary injunction on April 7. And yet, as Judge Ziegler pointed out in his findings at the hearing, that he said it wasn't fast enough when he gave them May 26, and, when we came in on May 22, he wasn't consenting just to hearing a preliminary injunction first.

You read the first part of his consent. It is: Consolidation of the motion for preliminary injunction with a hearing on the merits of injunctive relief.

And he is preserving only whatever is left in the jury trial for money damages.

That makes Beacon and it makes them all inapposite.

Now, the reason that it was important that this case be heard was because we had raised, not on May 22 as suggested here, but back in January of 1981—this man had filed five lawsuits, tying up an urgent and important redevelopment project to the City of Pittsburgh—this is all in the record—four of them in Common Pleas Court, one in Federal Court, deliberately doing it in a way that it put a cloud on the title by filing four equity actions in Common Pleas Court and then the claim for injunctive relief in this Court.

In our Answer in the State Court action, filed in January, six months before this hearing, we alleged as an affirmative defense that the document was a fraud, that it was a forgery.

And in this action, when I examined Mr. Jonnet on deposition, I presented that contract to him—and, again, this is all in the record—and he swore three times that "That is the contract on which I relied. That's the basis for my suit here."

So that's the context in which the Court should consider this jury trial argument.

I think when you look and you summarize the history of this case, when you consider it in its precise factual and procedural context, you come to the conclusion that Judge Ziegler's findings that this man was guilty of fraud, forgery and perjury—we proved that he perjured himself three times.

His whole position throughout the trial of the case was: "Well, I didn't need Conrail's approval."

Because what he had done, he had taken out two pages of the agreement that had that provision in it. One remained, and he said, "Well, they were all the same."

But there were critical differences. And as our document expert proved—he proved it so conclusively that Judge Ziegler, as he points out in his findings of fact, the evidence is overwhelming.

He took out the two pages that required board approval and specific notice in writing that the board had approved. Because the position he was taking throughout the litigation, all the State Court and Federal Court litigation, was: "Well, I had gotten approval when Mr. Jaeger said that he would submit it to the board."

We found out in the course of discovery—again, this is all in the record—that he had made three phone calls to Jim Kelly, who used to be Mayor Flaherty's assistant at Conrail, in August of 1980. He found out Kelly was at Conrail. And he said, "Jim, do you know Ed Jordan, the Chairman of the Board? I need approval of this contract, because the contract specifically requires approval. Can you get that approval?"

I asked him on deposition three times whether he ever did that, and he said, "No, because I didn't need it."

He was dealing with a fraudulent contract that had that provision eliminated.

Your Honors, for over a year and a half, a vital redevelopment project for the City of Pittsburgh which involves the Pennsylvania Station, the rotunda of which is on the National Register of Historic Landmarks, has been deteriorating rapidly.

From the time Mr. Jonnet filed this suit, he urged that it was vital that an early hearing be held. As Judge Ziegler pointed out, it was in the public interest to get an early determination of whether he was entitled to equitable relief.

We did extensive discovery, all directed to accommodating him. In Judge Ziegler's initial order at the time the Complaint was filed, not only did he order a hearing date but he ordered that we produce all of Conrail's officials at the hearing without a subpoena or anything. And we accommodated him.

We did extensive discovery on the merits of the injunctive relief claim. We went through two pre-trial hearings in which he reiterated his consent to consolidation of the trial on the merits of an injunctive relief claim with the preliminary injunction, preserving only whatever was left in the money damage action.

The money damage action doesn't place a cloud on the title to the property.

He did it not only in the motion where he consented, but two times thereafter, all the way up to the eve of trial. At the last minute he said, "I need more discovery. I can't go to trial, even on a preliminary injunction," or on the consolidation that he had consented to.

So what Judge Ziegler did was—he didn't even have to present evidence on the merits to even a preliminary injunction, he said, because the fraud issue, the question of whether there has been a fraud on the Court and on the parties and whether this man is guilty of forgery and perjury presents certainly a segregable issue.

I can't believe that a Court faced with an affront to its judicial process can't severe that issue and try it, especially in light of this consent.

And, therefore, that argument, the last argument that is made, that he needed more time for discovery, is utter nonsense. The only issue is whether this document had been forged.

As to Mary Metzler, in January they had notice. We told them, "This is a fraud. This is a forgery. We are going to prove it."

In May, at the first pre-trial conference, Judge Ziegler said, "These are serious accusations, and you had better get a document expert."

He ordered that we should make our report available. Judge Ziegler was most accommodating to this plaintiff. He ordered us.

I said, "Judge, we usually don't have to do that, especially in an injunction case and even in an action for money damages."

He said, "I'll tell you what. You make that available. When he gives you notice that he has a document expert, you give it to him 24 hours in advance."

And we agreed to do that.

This man was so cocky, Mr. Jonnet, when he took the stand. He thought that he was going to get away with a crime. It wasn't until we put the document expert on the stand that he finally asked for our expert report, on a Sunday morning. The trial was to start Monday morning.

When he saw what he was faced with, that's when these petitions for mandamus were filed in this Court, one on Friday afternoon after there had been no representation to Judge Ziegler that he was going to file a petition for mandamus. That was on the question of whether he needed further discovery; mind you, after the issue was narrowed to the question of whether this document was a fraud.

Mary Metzler sat in the courtroom. First off—it's in the record—she was first contacted on May 22, the day of the hearing.

And in the afternoon of that deposition, when I questioned Mr. Jonnet, after he said, "This is my contract," I asked him whether he had a document expert examine it. And he said no he hadn't, but, "You can be sure we are going to right now."

She had from May 22 until June 8.

Then we had two days of hearings, June 8 and 9. And the judge again—we were supposed to go from the 8th to the 11th. He had set these days aside to hear this case because of its importance. He said, "I will adjourn it and give you until the 15th."

He said, "Make your document expert available to Mary Metzler."

That's the kind of accommodation that Judge Ziegler gave to this plaintiff. And he asked our man how he conducted his test. Our expert testified that starting from scratch it would only take fifteen or sixteen hours—Your Honor, I have the citation to the record—to do anything. She didn't even have to start from scratch. She sat in the courtroom.

And what happened was we came back the next day to start the hearing, and we had a conference in chambers. And the judge asked what Mr. Silvestri was going to do for evidence.

He was only going to read from depositions. He states in open Court, at page 160, he has no substantive evidence to offer on the fraud issue.

It doesn't take much to understand why not when you read Judge Ziegler's findings of fact and conclusions of law. Your Honors, the evidence was so overwhelming.

We had a document expert show that the signatures which were on the last page of the document, the prior pages, had been turned over so the signature impressions should appear on page one. That was the one he had to eliminate because it required board approval.

And then there was page five that he had to eliminate, page 5 or six. I forget which.

And what this man showed in Court is that on the Jonnet document, page one has no impressions because that's the one that was substituted. We showed also, through ultra-violate techniques, that it was a different page altogether. It's even a different size. The fraud is so blatant.

One is in handwriting. It's a form that was filled in in handwriting. The other one is typewritten. So there was no question. One of the documents was a fraud.

He could offer no substantive evidence that Conrail did it.

In light of that, there are no impressions on the Jonnet document, on page one where they should first appear and be strongest. There are on pages two, three and four. It's missing from page five.

And the evidence is just overwhelming. Mary Metzler couldn't do anything with that evidence. She is a handwriting expert. We had scientific experts, one who worked for the State Police, now in Florida, and the performance, his demonstration of this fraud was just overwhelming.

On the question of recent developments, the urgency of this matter is reiterated by Judge Ziegler time and time again. The Pennsylvania Station has been abandoned for about four years, and it is deteriorating.

The article which Your Honor may have read spoke of the deterioration of the building and of the rotunda, which is a magnificent ediface, with the freezing and thawing weather. The last two winters have just been horrendous.

There is a feeling that if this case isn't resolved soon, the efforts taken by the URA notwithstanding, to try to take some remedial repairs will be to no avail.

In the face of Judge Ziegler's findings of fact and conclusions of law, these other four lawsuits, that's a recent development, have all been discontinued by the plaintiff so—

JUDGE ACKERMAN: The State suits?

MR. MANION: Yes, Your Honor, those which cast a cloud on the title.

So that the only case which still casts a cloud on the title is this one, because it's on appeal. It's an urgent matter.

We ask you to affirm the District Court. We think there is law here. We think that this man was accorded every right that anyone under our system of jurisprudence is entitled to, and then some.

My time is up. But, believe me, if you read the procedural history as set out in our brief, when you read the appendix, as I know you have on critical points, Dairy Queen and Beacon Theatres were merely the last procedural ploy of this plaintiff to try to further frustrate and delay the redevelopment project and the rehabilitation of the Pennsylvania Station.

Thank You, Your Honors.

MR. LEMOV: Five times the plaintiff-appellant asked for a jury trial in the Complaint.

JUDGE ACKERMAN: How many times did he waive it?

MR. LEMOV: He did not waive it at all. The Rules say that the waiver must be in writing or in stipulation in open Court.

JUDGE ACKERMAN: The motion—

MR. LEMOV: His motion did not waive it.

JUDGE ACKERMAN: That's according to how you read it.

MR. LEMOV: Judge, the Courts are uniform in holding that a motion to consolidate does not waive a right to a jury trial. I can give you three citations for that.

JUDGE ACKERMAN: All right.

MR. LEMOV: Proceeding to the question of what the Supreme Court was concerned about in Beacon, and that is: If a judge tries an element of a legal case, just an element, an issue, it's collateral estoppel in other cases.

That has happened already. Cases have been discontinued in State Court because the other side filed motions based on collateral estoppel—in this case, citing findings of fact which should have gone to a jury and repeatedly requested that they go to a jury.

All of the proceedings counsel so eloquently discussed at trial might have been entirely different, the testimony entirely different, the facts different if the constitutional procedures of the Seventh Amendment were adhered to.

It is inappropriate to erode those constitutional rights on so doubtful a question of waiver made by an attorney in a conference. There is only one possible way, and that's in a conference. And that was immediately corrected by mandamus to this court, by a written motion within three days.

We would urge the Court to—there is tremendous adverse publicity based upon a trier of the facts here which the Constitution says should not have heard this case because the issue is fundamental to the real antitrust claim.

You cannot restore the reputation that this plaintiff has lost because of this, but Your Honors can give him back, his company back the right to a jury trial.

We will expedite it. We will cooperate in every manner so that it is completed promptly and immediately.

The station was standing for two years before this contract was entered into with my client to buy the station. He put thousands of dollars down. He began renovating the building himself.

Is that a man who thought he didn't have a contract? He hired people. He renovated the building. He put $25,000 down for the second time with Conrail. He was all alone, without a lawyer. It was their real estate experts, their counsel were there, their forms, their collating machine, their Xeroxing machine.

The change of forgery here is a practical setup, and a jury will see that. A jury trial without the thrust of a judge with a preconceived position will see that fact. And the Constitution will be vindicated and so will this plaintiff.

Thank you.

CERTIFICATE OF SHORTHAND REPORTER

I, KATHERINE L. HIRST, Registered Professional Reporter, do hereby certify that the proceedings which appear in the foregoing transcript, pages 2 through 29a, inclusive, were taken by me in shorthand and thereafter reduced to typewriting by me or under my direction; that said transcript is a true record of the proceedings; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto, or financially or otherwise interested in the outcome of the action.

.../s/ KATHERINE L. HIRST...
Katherine L. Hirst

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JONNET DEVELOPMENT CORPORATION,
Plaintiff,

vs.

RICHARD S. CALIGUIRI, et al.,
Defendants.

Civil Action
No. 81-421

TRANSCRIPT OF PROCEEDINGS

of pretrial conference held in the above-entitled action on Monday, June 28, 1982 before the Honorable Donald E. Ziegler, District Judge.

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(The following proceedings were held commencing at 10:05 a.m.)

THE COURT: This is the case of Jonnet Development Corporation, plaintiff, versus Richard S. Caliguiri and others at Civil Action 81-421 and this is the date set for the pretrial conference by order of this Court. Further and originally, we had set a schedule for discovery on the equitable and legal claims of the plaintiff. That discovery schedule has now expired. Some of the parties have filed pretrial statements particularly the defendants. Others have filed motions for judgment which we will consider in due course.

On June 15, the Court received a letter from counsel for the plaintiff, namely, F. Peter Dixon which reads as follows: "Dear Judge Ziegler: Enclosed find a draft copy of the proposed motion to dismiss to be filed on behalf of Jonnet Development Corporation. As soon as I have received the original signed by the plaintiff's president, I will affix my signature and send on to you for consideration. I have likewise circulated draft copies to all other counsel in the case. I expect to submit the signed original not later than Monday, June 21, 1982."

I assume this means, Mr. Dixon, that the reason that you have not filed a pretrail statement on behalf of the plaintiff is that at some point you would urge the Court that the plaintiff is not interested in pursuing a legal claim for damages.

MR. DIXON: That's correct, Your Honor.

THE COURT: Further you by telephone notified me that you had orally requested the Court not to consider this motion until the Supreme Court has resolved the petition for writ of certiorari now pending in that Court.

MR. DIXON: Yes, Your Honor.

THE COURT: Is there any objection to that oral motion to delay the decision on the motion to dismiss the legal claims?

MR. FEENEY: Your Honor, is this going to mean—I know you haven't said it but does this mean this is going to delay decision on everything pending the certiorari motion?

THE COURT: I don't think so.

MR. FEENEY: Because I would object to that. Okay. All right.

THE COURT: The only thing before me at the outset is this oral motion by Mr. Dixon to delay considering the motion to dismiss the legal claim for damages until the Supreme Court resolves the petition for certiorari and that oral motion will be granted and we will delay until the Supreme Court rules the motion to dismiss by the plaintiff its legal claims.

Next we have a motion by Consolidated Rail Corporation and Edward [G.] Jordan and a [brief] to add Elmer Jonnet as counterdefendant on the counterclaim. The motion is clear and straightforward. The only concern I have is whether or not it is tardy, Mr. Manion, because discovery has closed and this is the day that the pretrial conference and the Court made its findings which are referred to in this motion sometime ago.

MR. MANION. I think not, Your Honor, for this reason that there is no prejudice by any lapse of time between your findings and the filing of the motion, that is, if we were dealing with the claim that required discovery—To begin with, [any] discovery that would be necessary on the claim presumably would be that of us, that is, Conrail but we see no—there's no need for any discovery, that is, there's nothing about this claim that required any kind of discovery. It's strictly a question of whether Mr. Jonnet can be held liable on the counterclaim that we have asserted and we see no prejudice of any kind from the motion to add him as a defendant and the case we cited in the Seventh Circuit I think makes this an a fortiori case because in that case there were multiple corporate officers whom the—I think it was the plaintiffs sought to add as defendants on the eve of trial and there could have been some objection [because] some of them were only tangentially involved but I think the evidence establishes in this case that when you speak of Jonnet Development Corporation, that is Elmer Jonnet so that the

identity of interests between the corporation and the individual defendant, the only individual defendant that we seek to add is even more apparent here than it was in that Seventh Circuit case but the point of it is that there's nothing about—It's strictly a legal matter based on the facts that were adduced at the earlier hearing and any facts concerning liability whether Mr. Jonnet can be held liable.

THE COURT: I see. We will give Mr. Dixon 15 days to file an answer to the motion and if you desire to recite any cases or provide a brief with that, he certainly has that right to do so and we will also consider that motion as soon as we have seen his response.

Is there anything else you want to say on the record with regard to that?

MR. DIXON: No, Your Honor. That's adequate.

MR. MANION: May I on the motion to dismiss, Your Honor? If I understand it that we have a commitment from the plaintiff that the basic claim for damages will be dismissed and that all that we're awaiting is the Supreme Court's decision on the petition for certiorari and that that will be dismissed whether the petition is granted or denied. As I understand it, the sole reason for deferral of the decision is a concern that if it's dismissed at this time that might be a relevant factor on the question whether certiorari would be granted but it is my understanding that you are going to dismiss ultimately.

MR. DIXON: That's correct.

THE COURT: All right.

MR. FEENEY: Claim for damages.

MR. DIXON: Right.

MR. FEENEY: Not the equitable relief.

MR. MANION: And that claim will be dismissed irrespective how the Court rules on the petition for certiorari.

MR. DIXON: That's correct.

THE COURT: Even if there should be a recantation on that commitment and at some point the plaintiff would attempt to assert the legal claim for damages.

I would point out that the plaintiff has not complied with our local rule. There is no pretrail statement filed and I think the Court would carefully consider dismissal of those legal claims for failure to comply with the local rule so in addition to that problem confronting the plaintiff, we also have the oral representation by its counsel that it does not intend to pursue at some point the legal claim for damages.

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(There was an off the record discussion.)

THE COURT: Thank you. The record will be prepared and the copies sent to all counsel at counsels' expense.

(The pretrail conference was thereupon concluded at 10:45 a.m.)

REPORTER'S CERTIFICATION

I hereby certify that the foregoing is a true and correct transcript of the proceedings held in the aforementioned action on Monday, June 28, 1982 before the Honorable Donald E. Ziegler, District Judge.

/s/ FLORENCE JONES

Official Reporter, U.S. District Court

Florence Jones
1023B Post Office Building
Pittsburgh, Pa. 15219
July 1, 1982

Office - Supreme Court, U.S.
FILED
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CLERK

No. 81-2274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JONNET DEVELOPMENT CORPORATION,
Petitioner

v.

RICHARD S. CALIGUIRI, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2274

JONNET DEVELOPMENT CORPORATION,
Petitioner

v.

RICHARD S. CALIGUIRI, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

I. RESPONDENTS' BRIEF DOES NOT DISPUTE THAT THE SEVENTH AMENDMENT JURY TRIAL RIGHT APPLIES TO PETITIONER'S ANTITRUST CLAIM NOR THAT THE DISTRICT COURT DECIDED ISSUES RELEVANT TO THAT CLAIM IN A NON-JURY TRIAL.

Respondents argue (Br. in Opp. 12) that this case presents the "mundane" question of whether petitioner waived its Constitutional right to a jury trial. The guarantees of the Constitution may not be so lightly brushed aside.

A non-jury proceeding has resulted in grave injury to the reputation of petitioner and its president. Criminal prosecution has been suggested by the district court and by counsel for respondent.[1] Petitioner's antitrust claim

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[1] C.A. App. at 133-34. "C.A. App." refers to the Joint Appendix filed with the U.S. Court of Appeals for the Third Circuit.

has been undermined. Common issues essential to that claim have been determined by a judge, not a jury. (See Pet. 9.) Collateral estoppel, based on the district court's non-jury determination, has resulted in respondents' filing of motions to dismiss related state court actions.[2]

Respondents do not dispute that petitioner's claim is legal in nature, nor that issues common to that claim were decided without a jury. Respondents' brief does not dispute any of the foregoing facts, but argues only that petitioner waived its rights. (Br. in Opp. 12-18.) The denial of a significant Constitutional right is virtually conceded by respondents.

II. RESPONDENTS' WAIVER ARGUMENT IS WITHOUT FOUNDATION IN THE RECORD OF THIS CASE.

Respondents do not dispute that petitioner demanded a jury trial in its complaint. They do not challenge the fact that petitioner moved orally and in writing on June 8, 1981, at the commencement of the non-jury trial, that a jury be impaneled. Further, on the following day, petitioner sought a writ of mandamus from the Court of Appeals for the Third Circuit in an attempt to protect its Seventh Amendment right. What else was petitioner to do to protect its rights?

Clearly, petitioner's response to respondent's Motion to Consolidate the Hearing on the Motion for a Preliminary Injunction with the Trial on the Merits expressly reserved petitioner's right to a jury trial. (Pet. 15.) This Court has held the right to a jury trial so fundamental that courts must indulge in "every reasonable presumption against waiver." *Aetna Insurance Co. v. Kennedy*, 301 U.S. 381, 393 (1937).

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[2] C.A. Supp. App. at 13. "C.A. Supp. App." refers to the Supplemental Appendix filed with the U.S. Court of Appeals.

Respondents rely (Br. in Opp. 13-14) principally on the cases of *Fenstermacher v. Philadelphia National Bank*, 493 F.2d 333 (3rd Cir. 1974), and *Southland Reship, Inc. v. Flegel*, 534 F.2d 639, rehearing denied, 539 F.2d 710 (5th Cir. 1976), to support their contention that petitioner waived its right to a jury trial. A review of those cases establishes the deficiencies of respondents' contentions.

In *Fenstermacher*, the plaintiff failed to make a timely demand for a jury trial. The trial court ordered consolidation of plaintiff's application for a preliminary injunction with the final hearing on the merits, and counsel did not object. The consolidated hearing was held, and on appeal, plaintiff *for the first time* asserted that he was denied his right to trial by jury. The Third Circuit, in finding waiver, emphasized the fact that (493 F.2d at 338; footnote omitted)—

> Appellant, however, failed to request a jury trial or to object to consolidation when he must have realized that final adjudication on the merits was taking place absent a jury.

Similarly in *Southland Reship, Inc. v. Flegel, supra*, the plaintiff did not assert that the bench trial denied his right to a jury until the case was on appeal from the unfavorable trial court judgment.

The underlying rationale of decisions such as *Fenstermacher* and *Southland* is sound. Once a party proceeds through a non-jury trial without objection, he should not be able to change his mind after trial is completed and judgment entered. That rationale does not apply to the instant case. Petitioner here made a timely demand for a jury trial and specifically preserved that right in its response to the Motion to Consolidate. Petitioner objected vehemently *prior* to the district court hearing and also sought relief by means of a writ of mandamus. Given these circumstances, application to this case of a rationale

based on cases where objection was not made until appeal, is unwarranted.

Furthermore, nowhere in respondents' brief is there any comment on Rule 39(a) of the Federal Rules of Civil Procedure and its application to this case. (See Pet. 14-16.) Rule 39(a) provides the exclusive procedure by which a timely demand for a jury may be withdrawn. No such written or oral stipulation "in open court" was made in this case. There was, therefore, no waiver as asserted by respondent. As pointed out in the Petition for Certiorari in *Skippy, Inc.* v. *CPC International Inc.*, No. 82-310, now pending before this Court, there is substantial and direct conflict between the circuits on the question of whether Rule 39(a) is the exclusive means of effecting a waiver of a jury demand. See pp. 14-16 of that Petition. Although the facts in this case regarding waiver are somewhat different than in *Skippy, Inc.*, such a conflict on a recurring question of constitutional law should be resolved by this Court.

III. QUESTIONS OF PETITIONER'S TRIAL STRATEGY AND THE FAILURE OF PETITIONER'S COUNSEL TO PRESENT A FULL CASE BEFORE THE DISTRICT COURT ARE IRRELEVANT SINCE THEY OCCURRED SUBSEQUENT TO THE DISTRICT COURT'S DENIAL OF THE PETITIONER'S SEVENTH AMENDMENT RIGHT AND WERE CAUSED BY THAT DENIAL.

Petitioner was subjected to a non-jury trial in a highly charged atmosphere. Counsel for petitioner conceded that his client was charged with "what is tantamount to a crime" and said he had not had an opportunity to reply to the allegations of fraud at the time of the trial.[3] Counsel for respondent summarized the allegations of fraud and perjury and referred to a political opponent of

[3] C.A. App. at 110.

Defendant Caliguiri, suggesting that an alliance existed with petitioner.[4]

Thereafter, counsel for respondent stated:

> MR. MANION: So, Your Honor, with that, with the convincing documentary experts, the evidence that would be demonstrated on slides and through other devices is overwhelming. With this corroborative evidence, we have an out-and-out case of fraud, forgery and, I believe, perjury.[5]

The trial court then warned of the possible result of the non-jury trial it was about to conduct:

> THE COURT: Well, if your allegations are correct, they raise a host of problems for a number of courts and a number of branches of government: The Executive Branch, the Judiciary, and certainly the State Court.
>
> I think the allegations are serious enough that they require a hearing; and even if you would consent to the dismissal of these actions, I would not approve it.[6]

In such an atmosphere of intimidation, it is obvious why petitioner chose to stand on its right to judgment by its peers rather than by the court.

Respondents' contention (Br. in Opp. 16-17) that petitioner's jury trial argument will be unavailing, given the evidence presented at trial, is unwarranted. Although trial counsel informed the district court that he had "a very strong case" [7], he did not have adequate time to prepare, and in light of the court's refusal to impanel a

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[4] C.A. App. at 131.

[5] C.A. App. at 133.

[6] C.A. App. at 133-34.

[7] C.A. App. at 115.

jury, decided to present only a limited defense.[8] Moreover, whether petitioner's president should have testified, and whether experts for the petitioner had adequate time to prepare (see Br. in Opp. 10) is irrelevant when a Constitutional right has been previously denied. Similarly, statements by petitioner's trial counsel made *dehors* the record and after an unrelated dispute between the attorney and petitioner (see Br. in Opp. 9) are not relevant to this case. They do not establish what a jury would have concluded if petitioner's rights had not been denied.

IV. THE CASE IS NOT MOOT.

The respondents refer (Br. in Opp. 11, 12) to certain events which occurred in the district court *after* the petition for certiorari was filed in this Court, and assert that a motion is "pending" in the district court to dismiss petitioner's legal claim, together with a commitment regarding disposition of this case. This is not correct, and any uncertainty suggested by the Brief in Opposition has been clarified by subsequent action of the district court. See Appendix to this Reply Brief, *infra*, pp. 1a-3a.

In fact, no motion to dismiss was ever filed. See App., *infra*, p. 1a. Settlement discussions did take place, but no agreement was reached. Trial counsel was not authorized to dismiss petitioner's damage claim, nor did he do so. See App., *infra*, pp. 1a-2a. As the materials in the Appendix to this Reply Brief show, any verbal comment to the contrary made by trial counsel at the pre-trial conference has been found to be "unauthorized" and has been "rescinded" by the court. See App., *infra*, p. 3a. Thus the episode recounted in the Brief in Opposition is now irrelevant and has no bearing on the fundamental question raised on this record, namely the protection of petitioner's constitutionally guaranteed right to trial by jury.

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[8] C.A. App. at 110.

CONCLUSION

This case is not moot. It presents for decision a constitutional question of enduring significance.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1982

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C. A. No. 81-421

JONNET DEVELOPMENT CORPORATION,
Plaintiff

vs.

RICHARD S. CALIGUIRI, *et al.*,
Defendants

MOTION TO WITHDRAW PROPOSED MOTION TO DISMISS

AND NOW, comes the Plaintiff, Jonnet Development Corporation, by its attorney, F. Peter Dixon, and moves your Honorable Court to permit the withdrawal of a draft Motion to Dismiss from consideration and to relieve Plaintiff of any prior committment regarding same, based upon the following:

1. On June 28, 1982, counsel for the Plaintiff, at a pretrial hearing, indicated to the Court that it was the intention of the Plaintiff to file a Motion to dismiss the action at law for money damages regarding the captioned case and that such Motion would be filed at some time in the future regardless of the ruling of the Supreme Court of the United States concerning a pending Petition for Writ of Certiorari.

2. At the time of making the aforesaid representation, counsel for the Plaintiff believed in good faith that he had authority to do so from Elmer Jonnet, president of the Plaintiff corporation, when in fact, due to a misunderstanding among counsel for the Plaintiff, appellate counsel for the Plaintiff in the Supreme Court and the president of the Plaintiff, such authority had not been

given and the aforementioned representations to the Court and to the parties were without authority.

3. Upon discovering the above, counsel for the Plaintiff consulted appellate counsel to verify the facts and obtain the Affidavits attached in support of this Motion.

4. Plaintiff will be prejudiced if held to the unauthorized committment made in error by counsel for the Plaintiff.

WHEREFORE, Plaintiff requests your Honorable Court to remove from consideration the draft copy of the Motion to Dismiss previously submitted and further to rescind the unauthorized committment of Plaintiff's counsel with regard to said Motion to Dismiss.

/s/ F. Peter Dixon
F. PETER DIXON, ESQUIRE
Attorney for Plaintiff

Filed: August 9, 1982

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C. A. No. 81-421

JONNET DEVELOPMENT CORPORATION,
Plaintiff

vs.

RICHARD S. CALIGUIRI, *et al.*,
Defendants

ORDER OF COURT

AND NOW, to-wit, this 30th day of August, 1982, upon consideration of the within Motion and after hearing thereon, it is hereby Ordered that the Plaintiff, Jonnet Development Corporation, is hereby granted leave to withdraw the draft Motion to Dismiss informally circulated among the Court and the parties to this action, without prejudice, and further any committment to dismiss any part of the within cause of action made by counsel for the Plaintiff is rescinded as unauthorized.

/s/ Donald E. Zeigler
J.